Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

WILLARD PROCTOR, JR.,
Petitioner,

v.

ARKANSAS JUDICIAL DISCIPLINE
AND DISABILITY COMMISSION
Respondent

On Petition for Writ of Certiorari
To The Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an attorney may advise and represent an administrative agency in a pre-adjudicatory matter and then, after the pre-adjudicatory matter has ended, prosecute a case before the agency involving the same matter without violating the due process rights of the party whose matter is before the agency for adjudication.

2. Whether an administrative agency's failure to produce documents used as a basis of its action to discipline a party violates the due process rights of that party.

II

PARTIES TO THE PROCEEDING

Petitioner is Willard Proctor, Jr. Respondent, who was the petitioner in the Arkansas Supreme Court below, is the Arkansas Judicial Discipline and Disability Commission.

TABLE OF CONTENTS

Page

Opinions below 2

Jurisdiction..... 2

Statutory provisions involved 2

Statement 3

Reasons for granting the petition 10

I. The Arkansas Supreme Court erred in ruling that the Executive Director and deputy executive director of the Judicial Discipline and Disability Commission could prosecute an action against the Petitioner on its behalf and then prosecute the Petitioner before it in the same matter without some form of internal separation..... 11

II. The Arkansas Supreme Court erred in ruling that the failure to produce relevant, exculpatory evidence did not violate petitioner's due process rights 25

Conclusion 33

Addendum A 1A
Arkansas Supreme Court Opinion

Addendum B.....92A
Opinion of Judicial Discipline and
Disability Commission (Full Commission)

Addendum C.....97A
Opinion of Judicial Discipline and
Disability Commission
(Three Member Panel)

Addendum D.....149A
Statutory Addendum

Addendum E.....222A
Excepts from Proceedings

TABLE OF AUTHORITIES

Page

Cases:

Allen v. Louisiana State Bd. of Dentistry, 543 So.2d 908, 916 (La. 1989) 13,14,16, 16, 17

Greene v. McElroy, 360 U.S. 474, 497 (1959) 25, 28 29, 30

Judicial Discipline and Disability Commission v. Simes, 2009 Ark. 543, ___ S.W.3d____ (2009) 1, 19

Judicial Discipline and Disability Commission v. Thompson, 341 Ark. 253, 16 S.W. 3rd 232 (2000). 1

Morango Band of Mission Indians v. State Water Resources Control Board, P.3rd 1147 (2009) 11

Nightlife Partners v. City of Beverly Hills, 108 Cal.App.4th 81 (Cal.App.2.Dist. 2003), ...24

Statutes and Rules

Commission Rule 8D..... 2

Commission Rule 11..... ..... 8, 18, 20,21

Commission Rule 9C..... 13

Commission Rule 9D 13, 18

5 U.S.C. §554 (c) 11

Other Sources

Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act* (1996) 32 Tulsa L.J. 297, 316..... 12

5 Wigmore on Evidence (3d ed. 1940) § 1367..... 30

2 Am. Jur.2d Administrative Law, § 313, "Separation of Prosecutorial and Adjudicatory Functions." 12

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On an Original Action in the Supreme Court of the State of Arkansas

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PETITION FOR A WRIT OF CERTIORARI

Willard Proctor, Jr., pursuant to the authority of 28 U.S.C. §1257, respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Pet. App. 1a-91a) is reported at 2010 Ark. 38. The Recommendation of the Arkansas Judicial Discipline and Disability Commission (Pet. App. 92a-97a) is unreported. The Initial Decision of the Three-Member Panel (98a-148a) is unreported.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on January 25, 2010. The jurisdiction of this Court rests on 28 U.S.C. §1257.

CONSTIUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" U.S. CONST. amend XIV, § XIV.

The relevant portions of Arkansas law and rules related to judicial discipline involved in this case, including, ARKANSAS CONST. amend LXVI,

A.C.A. §16-10-410, are set out in an appendix to this petition. Pet. App. 249a-153a.

STATEMENT

This case involves the extent to which an agency's attorney may participate in prosecuting a case before an agency while representing that agency in the same matter. It also involves the due process the occur when an agency fails to provide the evidence that it is using to prosecute a party.

On January 25, 2010, the Arkansas Supreme Court removed the Petitioner from the office of Circuit Judge. Under the judicial disciplinary procedures used by the Arkansas Supreme Court, a complaint against a judge is initially reviewed by the Executive Director of the Arkansas Judicial Discipline and Disability Commission (hereinafter referred to as "Commission"). If the Executive Director determines that the complaint warrants further investigation, he conducts an initial inquiry. During this initial inquiry, the members of the Judicial Commission comprised of three judges, three lawyers, and three lay persons, are involved in determining whether sufficient evidence exists to warrant further action.

If the Commission makes such a finding, the matter is then set for a probable cause hearing. If the Commission determines there is probable cause to proceed, the matter is then set for a hearing on

the merits. The hearing on the merits is a fact finding hearing if it is conducted by a three-member panel selected from the full Commission. Otherwise, the Commission makes its findings of fact based on the evidence presented at the hearing. If the full Commission finds that there has been no violation or finds a violation and imposes the sanction of censure or reprimand, the matter ends there unless it is appealed by the judge. If removal or leave is sought, the Commission makes a recommendation to the Arkansas Supreme Court. The Arkansas Supreme Court defers to findings of the Commission. It conducts a *de novo* review of the record and it will reverse the findings of the Commission only if it finds them to be clearly erroneous. *Judicial Discipline and Disability Commission v. Thompson*, 341 Ark. 253, 16 S.W. 3rd 232 (2000). The Arkansas Supreme Court may accept the findings, modify the findings, or reverse them. *Judicial Discipline and Disability Commission v. Simes*, 2009 Ark. 543, ___ S.W.3d____ (2009)

In the instant case, the Commission did not follow the procedures set out in the rules. Instead, it authorized its Executive Director to pursue an action in the Arkansas Supreme Court based on what it alleged to have been "undeniable facts." The Commission authorized its Executive Director to pursue this action before it had even conducted its initial hearing. When it made this

authorization, the Commission had not properly served the petitioner with one of the complaints that it, and the Arkansas Supreme Court, relied heavily upon in disciplining the petitioner. Under Commission Rule 8D, notice to the judge is mandatory. Commission Rule 8D specifically provides that no action other than dismissal shall be taken as to any complaint about which the judge has not be notified within ninety (90) days of receipt of the complaint by the Commission. The Executive Director claims to have mailed the complaint to the petitioner. The petitioner denies ever receiving the complaint and the Panel found there was a real question as to whether petitioner ever received notice. This complaint was dismissed. In what it termed as an extraordinary petition before the Arkansas Supreme Court, the Commission sought petitioner's temporary removal from office while the investigation was being conducted. In effect, the Commission had prejudged the case and determined that petitioner had committed at least one violation of the judicial canons that warranted his immediate removal.

On May 14, 2008, the Arkansas Supreme Court denied the Commission's petition. The Commission then proceeded to follow the process set out in its rules for the adjudication of complaints. It allowed its Executive Director and Deputy Executive Director to prosecute the case against the petitioner before it even after it had authorized the Executive

Director and Deputy Executive Director to represent it in its extraordinary petition before the Arkansas Supreme Court to have petitioner temporarily suspended.

On July 18, 2008, the Commission conducted an initial hearing. Petitioner filed a motion to dismiss. In the motion, Petitioner argued the case should be dismissed because the Commission had prejudged the case and violated due process by failing to follow its own procedure. Petitioner also raised the issue of due process in allowing the attorneys that represented the Commission to appear before it.

On September 19, 2008, the Commission conducted another hearing. During this hearing, it denied Petitioner's motion to dismiss. On October 10, 2008, the Commission conducted a probable cause hearing. On October 28, 2008, the Commission found that there was probable cause to proceed. The Executive Director prepared the probable cause findings and signed the Chairman's name to these findings. The Executive Director set the matter for a hearing on January 16, 2009. The Executive Director set the hearing outside the time required by the Commissions' Rules.

On October 31, 2008, Petitioner filed a Petition for mandamus with the Arkansas Supreme Court. The Petition once again sought to have the action dismissed based on the Commission's failure to

follow its rules. A stay was issued on November 3, 2008. On November 6, 2008, the stay was lifted by the Arkansas Supreme Court. On February 7, 2009, Petitioner filed another Petition for Writ of Certiorari. In this Petition, Petitioner once again raised due process objections to allowing the Commission to proceed with the action because it had failed to properly serve a Petitioner with a complaint, failed to timely set the matter for a hearing and impermissibly commingled prosecutorial and adjudicatory functions. Petitioner also argued that it was improper for the Executive Director to serve as counsel. On February 27, 2009, the Arkansas Supreme Court denied the petition.

On April 7, 2009, the Commission conducted a pre-hearing conference. The Commission once again found itself in a position of having to rule on the credibility of its attorney, the Executive Director of the Commission. The Executive Director stated that he had given all of the information in the files to the Petitioner. Later, after the hearing and when the case was on review before the Supreme Court, the Executive Director produced for the first time documents that it had in its possession. These documents related to matters requested by the Petitioner.

The final hearing was commenced on April 27, 2009. During this hearing, the Petitioner once

again raised his due process objections based on allowing the Executive Director to file the Petition on its behalf and serve as its attorney. The Petitioner also objected to not having been provided with all of the documents. . A deputy prosecuting attorney testified about notes and documents she had accumulated while working in Petitioner's court. Petitioner had requested these documents, but, had not been provided. There was a tape and a transcript of a meeting where it was established, without question, that these documents had been provided to the Executive Director. When an objection was raised, the Commission denied the request to exclude the witness. Instead, it recessed the hearing at 4:52 and gave the petitioner until 9:00 a.m. the next morning to prepare a response. The clerk's office closes at 4:30 p.m. and opens at 8:30 a.m. Petitioner had no time to retrieve documents or files let alone prepare a response.

A similar issue arose with respect to documents requested from a witness called as an accounting expert. Petitioner requested documents; however, he did not produce these documents. He was allowed to testify.

After the hearing, each party was allowed to submit proposed findings of fact. Commission Rule 11F requires the Panel to order the transcript of the pleadings and submit the record to the full Commission. The Commission allowed its attorney,

the Executive Director, to perform functions clearly prescribed by rule to be performed by the fact-finder. As a partisan advocate, the Executive Director failed to include portions of the transcript that dealt with the discovery rulings. It did not produce the transcript until after the Commission had made it recommendation to the Supreme Court. The matter was remanded with instructions by the Supreme Court to include the transcript.

On September 23, 2009, the Executive Director produced Commission files requested by the Petitioner for the first time. In his brief to the Arkansas Supreme Court, Petitioner raised due process arguments to the Executive Director being allowed to serve as counsel of record in a Petition that he filed and then prosecute the case. The Petitioner also raised due process arguments to the failure to produce documents and exclude the testimony of witnesses.

On January 14, 2010, oral arguments were held before the Supreme Court. On January 25, 2010, the Arkansas Supreme Court issued an order removing petitioner from the bench. In its order, the Arkansas Supreme Court acknowledge that there were indeed violations of procedures, but it found that Petitioner was not prejudiced by these violations. It found no prejudice in allowing the Executive Director to serve as counsel for the Commission and prosecute the case. It also found

no prejudice in the Commission's failures to produce documents and exclude witnesses. It is from this ruling that petitioner seeks review by this Court.

REASONS FOR GRANTING THE PETITION

This case merits review by this Court to correct fundamental legal errors made by the Arkansas Supreme Court that are in direct conflict with decisions of other state courts and federal agencies regarding the proper conduct of administrative agency decision makers and their attorneys. This case also merits review by this Court because the Arkansas Supreme Court's decision has far reaching implications on the ability of the thousands of persons that appear before administrative agencies to have their matters adjudicated during a fair hearing before an impartial tribunal. The decision threatens a party's rights to due process guaranteed in the Constitution.

The Arkansas Supreme Court has condoned the practice of allowing the same agency attorney that represents the agency in a pre-adjudicatory action that it initiates against a party to subsequently prosecute the same party before the agency involving the same matter without any internal separation. The Arkansas Supreme Court has also erred in holding that an agency may withhold relevant, exculpatory evidence from a party

without implicating that party's due process rights. The actions of the Arkansas Supreme Court in condoning such practices warrant the grant of *certiorari*.

I. THE ARKANSAS SUPREME COURT ERRED IN RULING THAT THE EXECUTIVE DIRECTOR AND DEPUTY EXECUTIVE DIRECTOR OF THE JUDICIAL DISCIPLINE AND DISABILITY COMMISSION COULD PROSECUTE AN ACTION AGAINST THE PETITIONER ON ITS BEHALF AND THEN PROSECUTE THE PETITIONER BEFORE IT IN THE SAME MATTER WITHOUT SOME FORM OF INTERNAL SEPARATION.

It is improper for an attorney that represents an agency to appear before it and prosecute a party in the same case involving the same matter. See, 5 U.S.C. §554 (c), *Morango Band of Mission Indians v. State Water Resources Control Board,* P.3rd 1147 (2009) This Court should accept *certiorari* in this case to insure that the precedence that the Arkansas Supreme Court has set never gains a foothold in our jurisprudence.

The problem which is at the core of this case is that while adjudicating Petitioner's case, administrative agency decision makers allowed the same agency attorneys that it authorized to pursue an action on its behalf against the Petitioner to

subsequently appear before it and prosecute the same case against the Petitioner. "Separation of functions must be defined and administered in ways that permit decision makers access to needed staff advice except in cases where the adviser has significant adversarial involvement in the case under decision." Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act* (1996) 32 Tulsa L.J. 297, 316. Where, as in this case, counsel performs as an advocate, he should be precluded from advising a decision-making body in the same case. See, 2 Am. Jur.2d Administrative Law, § 313, "Separation of Prosecutorial and Adjudicatory Functions." The advocate has a distinct advantage because he comes to the process with the mantra of credibility having carried it on behalf of the agency when he has advised or represented the agency in the same matter.

In the instant case, the Executive Director of the Judicial Discipline and Disability Commission advised the Commission, before it gave Petitioner any of the process afforded by its rules, to pursue a pre-adjudicatory action against the Petitioner seeking his temporary removal from the bench. Having served as the Commission's attorney he was given an unfair advantage during the processing of Petitioner's case before the agency. His advantage is reflected in the how the Commission allowed him to perform functions that

were reserved to it as the adjudicator and how it ruled on issues that arose during the processing of the case.

The Commission Rules provide that it will make a probable cause determination of whether a judge has violated judicial canons or other rules before proceeding to a formal disciplinary hearing. The probable cause hearing is not a part of the investigatory phase of the disciplinary process. Therefore, the Executive Director's role is changed. During the meeting, the strict rules of evidence are not observed." However, a complete verbatim record is made. Commission Rule 9C. After the hearing, the Commission is required by its rules to prepare a written report containing its findings of fact and its conclusions on each issue presented. It is then required to file it with the Executive Director. Commission Rule 9D.

The Commission did not follow this procedure in this case. Instead, the Executive Director was allowed to prepare the Commission's probable cause findings and sign the name of the Commission Chairman to the findings. He then filed the report with himself and hand delivered a copy to the Petitioner.

In *Allen v. Louisiana State Bd. of Dentistry*, 543 So.2d 908, 916 (La. 1989), the Louisiana Supreme Court held that an advocate's preparation

of an adjudicator's findings of fact and conclusions after the adjudicator had reached a decision constituted an impermissible commingling of the prosecutorial and adjudicatory functions. In 1985, the Louisiana State Board of Dentistry brought formal charges against Dr. William Allen alleging various violations of the Louisiana Dental Practice Act. The charges were investigated by Guy Wootan, counsel for the Board of Dentistry. In 1986, the disciplinary committee of the Board of Dentistry held an administrative hearing at which Allen was allowed to contest the charges. Wootan served as prosecutor for the Board at that hearing. At the hearing's conclusion, the disciplinary committee deliberated for a few hours and then voted to suspend Allen's license for ten years, among other penalties.

Soon thereafter, the chairman of the disciplinary committee contacted Wootan. He informed him of the Board's decision and also instructed him to prepare the findings of fact and conclusions for the committee. Wootan then drafted detailed findings and conclusions which were signed by each committee member. Allen subsequently petitioned the Supreme Court of Louisiana to determine whether the Board of Dentistry improperly combined the prosecutorial and adjudicatory functions and therefore denied him a hearing before an impartial tribunal. *Allen*, 543 So.2d at 909-911.

The Louisiana Supreme Court concluded that Wootan's involvement with the administrative decision making process denied Allen due process of law. *Id.* at 915. It began by describing Wootan's level of involvement with the adjudicatory function:

> Wootan was not merely a scribe; he became the main fact finder. The detailed findings and credibility judgments which were offered in support of the committee's final decision and which play such a critical role in meaningful judicial review were simply not those of the neutral hearing committee. They were the secret product of an advocate.

Id. at 913. It further noted that: "[B]y drafting the committee's findings and conclusions, Wootan put himself in the position of the adjudicator. He performed duties delegated to the committee as trier of fact..." *Id.* at 914. The Louisiana Supreme Court held that advocates cannot participate in the adjudicatory function without violating due process. It stated:

> "[P]rocedural protections...are designed to insure that persons subject to the administrative process receive a fair hearing before a neutral decision

> maker. This basic...purpose is defeated when an advocate performs the adjudicatory function of arriving at findings of fact..." *Id.* at 914. It did not consider Wootan a neutral party, since "his role was that of advocate, one who has developed the 'will to win.'"

Id. The Louisiana Supreme Court also found Wootan's involvement with the adjudicatory function infirm on other grounds. It stated:

> [C]ourts must be vigilant in assuring that parties in administrative adjudications receive the procedural protections our law affords...Wootan's dual role as prosecutor and fact-finder violated Allen's right to a neutral adjudicator. In addition, however, this commingling of functions violated Allen's right to a hearing that is both fair and that has the appearance of fairness...

Id. at 915. Wootan's immersion in the adjudicatory function created the appearance of impropriety and therefore violated due process: "Apart from the substantive unfairness caused by Wootan's roles as investigator, general counsel, prosecutor and fact finder, this commingling of functions clearly created the appearance of impropriety. This,

coupled with the actual prejudice Allen suffered, is sufficient to constitute a denial of due process." *Id.*

In this case, the Executive Director's role was similarly that of investigator, general counsel, prosecutor and fact finder. He, along with Commission Members, investigated the allegations made against the Petitioner prior to the probable cause hearing. He served as general counsel for the Commission when he filed its pre-adjudicatory action on behalf of the Commission. The Commission announced its findings during the probable cause hearing. The Executive Director drafted the Commission's findings of probable cause. By Commission Rule, this is a function which the Commission, as adjudicator, is required to perform. *See* Commission Rule 9D. The Executive Director then signed the name of the Commission Chairman to the probable cause findings. In *Allen*, a due process violation was found where each member of the Board signed the findings prepared by the advocate. The commingling of prosecutorial and adjudicatory functions in this case was constitutionally impermissible.

The impropriety of the Commission allowing its attorney to prosecute this case can also be seen in other violations of Commission rules on the part of the Executive Director. The Commission failed to hold a timely hearing on the merits of

Petitioner's case because it was set outside the time by the Executive Director. Commission Rule 11A requires that a public hearing be held not less than thirty (30) nor more than forty-five (45) days after receipt of the Judge's response to the finding of probable cause, unless continued for good cause shown. Commission Rule 9D3 gives the judge twenty (20) days to respond after receiving the probable cause finding. In this case, the statement of formal charges was hand delivered to Petitioner on October 28, 2008. In this letter, the formal hearing was scheduled for January 16, 2009 at 11:30 a.m. Petitioner filed his response on November 17, 2008. January 16, 2009 was more than forty-five (45) days after receipt of Petitioner's answer. So, from the beginning, the public hearing was set outside the time required by Rule 11A.

When this issue was raised, the Commission had to rule on whether to dismiss the case based on the failure to follow its rules. The Arkansas Supreme Court noted the following in two footnotes:

> "13The Commission further asserts that the dates scheduled were agreed to by Judge Proctor's counsel; however, we note that there is absolutely nothing in the record that so demonstrates, nor was counsel for the Commission able to direct this

> court to such during oral argument. The Commission also makes the statement in its brief and referenced in oral argument that it is afforded discretion; we have never so held, nor do we now.
>
> 14We note that we are troubled by the Commission's repeated failure to follow its own rules, as evidenced in this opinion and in *Simes*, *supra*, and we, therefore, take this opportunity to caution the Commission to follow its rules as written. While to date the Commission's noncompliance has not resulted in a violation of a judge's rights, the Commission should take pains in the future to follow its rules and to document its actions so as to preclude future allegations of rule violations and to better facilitate this court's review of alleged rule violations if and when those allegations are made."

Proctor, supra at 41. These footnotes highlight the frequency with which rule violations occur when an agency allows the same attorney that it has relied upon to advise and represent it to then prosecute the same matter before the agency. The agency attorney has developed a "will to win." The

Commission understandably defers to the attorney because it has relied upon him in processing the case. As a result, when patent rule violations occur they are ignored. The idea of the same person serving as advisor to the Commission and prosecutor before the Commission in the same matter is anathema under our notions of due process.

There were still yet other rule violations excused by the Commission. After the hearing on the merits, the Executive Director was allowed to decide which portions of the transcript would be prepared and which portions of the record the full Commission would review. Commission Rule 11F provides that a "factfinder other than the entire Commission shall, within sixty (60) days after the [formal disciplinary] hearing, submit its findings and recommendation, together with the record and transcript of the proceedings, to the Commission for review and shall contemporaneously serve them upon the judge." Commission Rule 11F. (emphasis added) In this case, the Panel delivered its Opinion to the Executive Director and chose to do nothing else. Instead, it delegated its responsibilities to the Executive Director.

The Executive Director was an advocate. He was not a factfinder. He should not have been allowed to perform the roles and functions of the factfinder. As an advocate, the Executive Director

decided not to submit and serve the transcript from the proceedings where discovery issues were discussed. He also decided not to submit and serve a record at all. These are not ministerial functions or decisions that he was entitled to make. Nor were they ones that the Panel could delegate to him, as they are specific factfinder functions. The Commission allowed the Executive Director to perform these fact finding functions in clear contravention of Rule 11F. Again, this commingling of functions was constitutionally impermissible.

The problems with the Executive Director serving as counsel and prosecuting the case before the Commission were magnified even greater when it came to Commission rulings which required a credibility determination between counsel. The Executive Director failed to produce documents that its witnesses had provided to him until they testified at the public hearing. When the issue was raised, the Commission was put in a position of determining whether the Executive Director had in fact received the documents before the hearing. This required the Commission to rule on the credibility of the attorneys that it had authorized to file an action on its behalf in the same case.

Ms. Tonia Goolsby worked as a deputy prosecuting attorney in Petitioner's court. When asked on cross examination whether, during a

meeting between the Executive Director and prosecutors, he had asked for and been provided copies of her notes, she indicated that she "supplied some records and notes to Mr. Stewart." (App 222a-231a) Even without her testimony, the objective, unbiased transcript of the tape from the meeting clearly demonstrated that the Executive Director received copies of several documents including notes that Ms. Goolsby testified from at the hearing. (App. 222a-231a) At one point, Mr. Larry Jegley, the Prosecuting Attorney, said, "Yeah, go get your copies." (App. 239a) Ms. Goolsby then went and got copies. (App. 239a)

At 4:52 p.m. on April 28, 2009, the Panel made the following ruling:

> "We're not convinced that the Executive Director's office had these documents that's been testified to by the previous witness. We're going to adjourn at this time and will give Judge Proctor overnight to review these documents and you can continue with your questioning tomorrow."

(App 231a)

Putting aside for now the due process implications of failing to disclose these documents, the crucial point being addressed now is that the

Panel believed its Executive Director's unsworn statement over the sworn testimony of a deputy prosecuting attorney. It also found his statement to be more credible than the objective evidence found in a tape transcript which manifestly demonstrated that documents were discussed, disclosed and provided to him. This is troubling from a due process standpoint. It is clear that the Executive Director received documents from Ms. Goolsby. It is also clear that he failed to produce any documents from Ms. Goolsby during discovery. If the Executive Director lost or misplaced these documents, he was in no position to state that the specific documents which Ms. Goolsby testified about were not among those previously provided to him. Ms. Goolsby's testimony was important to the Executive Director's case. It was relieved on by the Commission and the Arkansas Supreme Court in its ruling. The decision about admissibility should not have been made by the Commission because it authorized the Executive Director to represent it. It was forced to make a ruling on its attorney's credibility.

The Commission was also required to make a similar credibility determination involving the Executive Director regarding Mr. Bruce Engstrom, Mr. Engstrom was the Executive Director's accounting expert. As a part of discovery, Petitioner asked for any and all documents. The Executive Director did not provide a copy of

invoices or its retainer agreement. Mr. Engstrom billed $50,000.00 for his testimony. When this was objected to by the Petitioner, the Commission allowed his testimony.

The case highlights the problems inherent in allowing the same attorney that advises or represents an agency to then subsequently appear before it in the same matter without some form of internal separation of functions. There were clear instances where the objective evidence would require a ruling against the Executive Director. Instead, the Commission crafted a means to allow its attorney to proceed. The mantra he wore while prosecuting the pre-adjudicatory action on the Commission's behalf continued to protect him as he prosecuted the case before the Commission. Due process does not allow this.

In *Nightlife Partners v. City of Beverly Hills*, 108 Cal.App.4th 81 (Cal.App.2.Dist. 2003), a California appellate court held that allowing an advocate to advise an adjudicator while she conducts an administrative hearing constitutes an impermissible commingling of prosecutorial and adjudicatory functions. In this case, the Executive Director advised the Commission to file a pre-adjudicatory action against the Petitioner. He then served as the Commission's counsel in that proceeding. And, ultimately, he prosecuted the action against the Petitioner before the

Commission. This, too, was an impermissible commingling of prosecutorial and adjudicatory functions.

It was a denial of due process for the Commission to authorize the Executive Director to pursue Petitioner's suspension and then allow the Executive Director and Deputy Executive Director to appear before it to prosecute the same case against Petitioner. This Court should accept *certiorari.*

II. THE ARKANSAS SUPREME COURT ERRED IN RULING THAT THE FAILURE TO PRODUCE RELEVANT, EXCULPATORY EVIDENCE DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS.

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy,* 360 U.S. 474, 497 (1959) In this case, the Arkansas Supreme Court chose to ignore this immutable principle of our jurisprudence when it allowed the Commission to wait until after the disciplinary

hearing while the case was on appeal to disclose relevant, exculpatory evidence. This holding threatens the very underpinnings of a litigants rights to due process when appearing before an administrative tribunal.

Petitioner requested a copy of all Commission files related in any way to the allegations that were being made against him. He was never given access to the case file in Case Number 2005-265. In his September 3, 2009 filing in the Arkansas Supreme Court, the Executive Director produced the file. A letter from former Cycle Breakers, Inc. Director Alice Abson was contained in the file in which she made statements in response to allegations of misconduct. The Executive Director had been ordered to "provide statements . . . in those closed files." At the public hearing, Ms. Abson testified about improper conduct by Judge Proctor; yet, in this letter, written during the time in question, she stated "I have no knowledge of illegal activities." At the hearing, Ms. Abson testified that Judge Proctor took over the responsibilities of dealing with the money. In the letter she stated, "**Complaint** – Judge Proctor will not let anyone get the money but him. **Fact** – All staff collects money and give receipts." She also explained that, "when a payment [is] received, a receipt is given. Probationers have been told never to give cash without getting a receipt. An independent audit is conducted." Ms. Abson's

statement about Civil Probation further supported the fact that the Commission was aware of the existence and operations of the Civil Probation program and had found nothing improper. She stated, "[w]hen a probationer has completed ½ of the probation period and has complied to all conditions of probation, a request is submitted to the prosecuting attorney to close the criminal case. If approved, the case is converted to Civil with conditions that have to be followed." So, when the Commission found Judge Proctor had violated the judicial canons in collecting and enforcing the payment of civil fees, it was in contradiction to its previous finding. Petitioner's due process rights were violated when the Executive Director failed to produce this letter.

Petitioner was never given access to the case file in Case Number 2005-308. The Notice in that case file recommending dismissing the complaint because Petitioner agreed to change procedures regarding probationers was also not disclosed until September 3, 2009. Unlike other complaints, it was not anonymous. It proved the Commission did not seek sanctions against the Petitioner in a new case involving contact with probationers based upon his agreement to make changes in his procedures. The Executive Director resisted producing these types of records arguing they were "not going to turn over . . . work product or other parts of that file." But, after the public hearing, the entire files were

produced because "Judge Proctor has made reference to them." The Petitioner's due process rights were violated because the Executive Director's failed to produce this Notice.

When these issues were raised before the Commission, it did not have a transcript from the hearing where discovery rulings were made and there was no written order. The Commission denied Petitioner's motion without explanation.

This Court has made clear that it is important for a governmental entity seeking to deprive an individual of his interests to disclose both documentary evidence and evidence that consists of the testimony of individuals "whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Id.* These protections are formalized in the requirements of confrontation and cross-examination. They have ancient roots. As this Court explained in *Greene:*

> "They find expression in the Sixth Amendment, which provides that, in all criminal cases, the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out

not only in criminal cases, *e.g.*, *Mattox v. United States,* 156 U. S. 237, 156 U. S. 242-244; *Kirby v. United States,* 174 U. S. 47; *Motes v. United States,* 178 U. S. 458, 178 U. S. 474; *In re Oliver,* 333 U. S. 257, 333 U. S. 273, but also in all types of cases where administrative and regulatory actions were under scrutiny. *E.g., Southern R. Co. v. Virginia,* 290 U. S. 190; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292; *Morgan v. United States,* 304 U. S. 1, 304 U. S. 19; *Carter v. Kubler,* 320 U. S. 243; *Reilly v. Pinkus,* 338 U. S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 341 U. S. 168-169 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the

> necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test has found increasing strength in lengthening experience."

Id at 497-498. Production of the documents was necessary to probe bias and whether the charges that were being testified to were reasonable and correlated to actual work performed.

As previously noted, the Executive Director also failed to produce documents that Tonia Goolsby and Bruce Engrstrom provided to him until they testified at the public hearing. At 4:52 p.m. on April 28, 2009, the Panel adjourned and gave Petitioner overnight to review numerous documents and to continue questioning on the next day. There were several documents making specific references to events in cases that could only be rebutted by the County Court Clerk's official files. The hearing began the next morning at 9:00 a.m. Giving Petitioner overnight to review numerous documents that he had requested in

November of 2008 and ordered to be provided by April 13, 2009 was not fair. The County Court Clerk's office closed at 4:30 p.m. and did not open until 8:00 a.m. Petitioner could not effectively address the issues raised by Ms. Goolsby.

Production of documents produced by Mr. Engstrom was necessary to probe bias and whether his charges were reasonable and correlated to actual work that he performed. No safeguard for testing the value of human statements is comparable to that furnished by cross-examination. *Id.* Failing to produce documents until the hearing when Petitioner was in not position to effectively use them violated his due process rights. Failing to produce documents until after the hearing when the case was on review in the Arkansas Supreme Court was an even more egregious due process violation. The Arkansas Supreme Court's ruling threatens to breach the immutable principle that an individual is entitled to disclosure of the evidence which the government relies on in reaching its facts in order to have an opportunity to refute the evidence. This Court should grant *certiorari.*

CONCLUSION

The petition for writ of *certiorari* should be granted.

Dated: April 23, 2010

Respectfully submitted.

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APPENDIX A

ARKANSAS SUPREME COURT

No. 09-738

ARKANSAS JUDICIAL DISCIPLINE AND
DISABILITY COMMISSION,
PETITIONER,

VS.
HONORABLE WILLARD PROCTOR, JR.,
RESPONDENT,

Argued: January 14, 2010
Opinion Delivered: January 25, 2010

Recommended Findings Accepted in Part, Modified in Part, Rejected in Part, Recommendation of Removal Accepted; Removal Ordered

OPINION OF THE COURT

PAUL E. DANIELSON, Associate Justice:

Petitioner Arkansas Judicial Discipline and Disability Commission ("the Commission") has filed with this court its final findings, conclusions, and recommendation, pursuant to Arkansas Judicial Discipline and Disability Commission Rule 12A (2009), in which it recommends that this court remove respondent the Honorable Willard Proctor, Jr., from the office of Circuit Judge of the Sixth Judicial District, Fifth Division, of the State of Arkansas. The Commission bases its recommendation of removal on its conclusions that Judge Proctor willfully violated Canons 2, 2A, 2B, 3B(4), 3B(7), 4A, and 4C of the Arkansas Code of Judicial Conduct (2007). We accept the Commission's recommended[1] findings in part, modify them in part, and reject them in part; we accept the Commission's recommendation of removal; and we order Judge Proctor removed. The

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[1] New canons were adopted by this court and became effective, July 1, 2009. *See In re Arkansas Bar Ass'n Petition to Amend Code of Judicial Conduct*, 2009 Ark. 238, ___ S.W.3d ___ (per curiam). However, the complaints against Judge Proctor were lodged in2007 and, therefore, involve the 2007 canons.

instant matter arises from allegations regarding Judge Proctor's involvement in and relationship with a probation-type program, known as Cycle Breakers;[2] the impropriety of relationships with defendants within his jurisdiction; and his treatment of his staff. During a hearing before a three-member panel of the Commission, testimony was presented from several witnesses, including

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[2] 2According to a 2007 Legislative Joint Auditing Committee Investigative Report, which was introduced into evidence by the Commission, Cycle Breakers is a program that was started by [Judge Proctor] through the Court on January 1, 2001, before Cycle Breakers, Inc. existed, and is considered part of Court probation. The mission of the Program is to aggressively intervene in lives of individuals to stop the cycle of crime and deter further involvement in the judicial system. The Program uses time a defendant is under the Court's jurisdiction to affect change in the individual's lifestyle, behavior, and decision-making ability through intensive supervision. Non-violent, first-time Court offenders placed on probation are usually required to participate in the Program, without a participation fee, as a condition of their probation. County Probation Officers evaluate defendants, assist in developing individuals' case plans, goals, and objectives, and match Program participants with mentors. Mentors are past participants who have successfully completed the Program or community volunteers.

To meet the Program's objectives, participants are required to make contact with mentors, attend mandatory monthly/quarterly meetings, submit to random drug testing, and perform community service.

several current and former employees of Judge Proctor; a deputy prosecuting attorney from the Pulaski County Prosecutor's Office, who was the former division chief for the Fifth Division; a deputy over the Investigative Special Reporting Section of the Legislative Joint Auditing Committee; a certified public accountant; the attorney for Cycle Breakers, Inc.; a Little Rock City Director; the Pulaski County Civil Attorney; the court administrator of the Pulaski County Clerk's Office; and Judge Proctor himself. Following the hearing, the panel issued its opinion, which included findings of fact and conclusions of law and recommended removal based solely upon the allegations regarding Judge Proctor's contact and interaction with one specific defendant in his court, Demoreo Davis. Specifically, the three-member panel concluded:

Given all of that which is before the full commission, it is our belief that there is compelling proof, and there are, as well, compelling reasons for Judge Proctor to be removed from the bench for the Demoreo Davis allegations alone. The contact and interaction the judge had with Demoreo Davis, alone in his home, alone in car rides, in the office, and, most of all, in the fact and in the manner that Proctor sent money to him at the ADC are beyond reproach. These allegations alone require this three-member panel to find unanimously that

Judge Willard Proctor, Jr. should be removed from the bench.

If the Demoreo Davis allegations are not accepted by the full Commission or by the Arkansas Supreme Court for any reason, which we find there is none, there are other remaining allegations that we have found as fact and have concluded as violations of law. It is our belief that while actionableas misconduct, there are modes of punishment more measured and less drastic than removal that could address and sanction the allegations sustained. All of the problems set forth within the complaints before us occurred while Proctor disposed of a criminal docket, not a civil docket. A lesser punishment that seems fitting to us for the remainder of the allegations would be a six-month suspension from the bench, without pay for three months, with pay for three months, as well as a fine or assessment of $25,000.00 to be paid for the costs of the staff's investigation and prosecution of this petition and these cases, and a directive from the Arkansas Supreme Court that Judge Proctor be relieved of conducting criminal and juvenile dockets so long as he serves as a judge in this state, restricting his caseload to handling civil and/or probate matters only.

In accordance with the Rules of Procedure of the Arkansas Judicial Discipline and Disability

Commission (2007), the full commission reviewed the panel's decision and entered its own findings of fact, conclusions of law, and recommendation. Specifically, the Commission found the following violations of the judicial canons:

> 1. Judge Proctor willfully violated Canon 2B by preparing a "profit & loss" statement for his Division and sending it to the bank for a determination of the credit worthiness of Cycle Breakers, Inc.
> 2. Judge Proctor served as an officer, director, trustee or non-legal advisor of an organization that was be (sic) engaged in proceedings that ordinarily came before the judge in violation of Canon 4C.
>
> 3. Judge Proctor willfully violated Canon 4C by lending the prestige of his office to a private corporation by preparing a "profit & loss" statement for his Division and sending it to the bank for a determination of the credit worthiness of Cycle Breakers, Inc.
>
> 4. Judge Proctor willfully violated Canon 4A of the Code by involving himself in the operation of Cycle

Breakers, Inc. to the extent that it cast reasonable doubt on the judge's capacity to act impartially as a judge.

5. Judge Proctor willfully violated Canon 4A of the Code by personally involving himself with party defendants in his Court to the extent that it cast
reasonable doubt on the judge's capacity to act impartially as a judge.

6. Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by sending money to a convicted robber that he sentenced to the Department of Corrections (sic).

7. Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by allowing a party defendant in his Court to live at the Judge's personal residence for over a week.

8. Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by allowing a party defendant in his Court to live

at the Judge's personal residence on certain weekends.

9. Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by giving rides in his personal vehicle to at least eight (8) party defendants.

10. Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by having inappropriate contact with party defendants subject to his jurisdiction, by collecting money from them in open court and eating lunch and visiting with them in chambers.

11. Judge Proctor willfully violated Canon 3B(7) by engaging in ex parte contact with party defendants subject to his jurisdiction, by giving them car rides, by visiting with them at Cycle Breaker (sic) meetings, and by visiting with them in the courthouse outside of a court setting without counsel or the State present.

12. Judge Proctor willfully violated Canon 4A of the Code by stating that

he knew he might lose his judicial office based on his actions regarding party
defendants subject to his jurisdiction.

13. Judge Proctor willfully violated Canon 4A of the Code by allowing his personal interests regarding rehabilitating criminals to be superior to his sworn
duty as a judge.

14. Judge Proctor willfully violated Canon 3B(4) by coercing his staff into working for Cycle Breakers, Inc.

15. Judge Proctor willfully violated Canon 2A of the Code by failing to respect and comply with the law by ignoring and by-passing laws that were an impediment to his interest in Cycle Breakers, Inc.

16. Judge Proctor willfully violated Canon 2A of the Code by failing to respect and comply with the law by enforcing payment of "civil fees" from these defendants with the jail (sic) or with the threat of jail, knowing the

> money would go to his non-profit corporation.

The Commission then made the following recommendation to this court:

> Given all of that which is before the full commission, it is our belief that there is clear and convincing evidence and proof, and there are, as well, compelling reasons for Judge Proctor to be removed from the bench.

We must determine whether to accept the Commission's recommended findings and recommendation of removal.[3]

Based upon a review of the entire record, this court shall file a written opinion and judgment directing such disciplinary action as it finds just and proper. *See* Ark. Jud. Discipline & Disability Comm'n R. 12E (2009). We may accept, reject, or modify in

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[3] We note that the Commission did not state in its findings, nor in the hearing during which it deliberated, that it adopted, in whole or in part, the three-member panel's findings, nor was the Commission able to cite this court to any such language during oral argument. While the findings of the full Commission are substantially similar to those of the panel, there is no indication that the full Commission indeed adopted the panel's findings.

whole or in part, the findings and recommendation of the Commission. *See id. See also Judicial Discipline & Disability Comm'n v. Simes*, 2009 Ark. 543, ___ S.W.3d ___. This is a matter requiring de novo review, and we will not reverse the Commission's findings unless they are clearly erroneous. *See Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000).

I. Impropriety of Relationships with Defendants

At issue, first, is whether Judge Proctor had relationships of an improper nature with defendants subject to his jurisdiction. The Commission concluded that he did, and it found that Judge Proctor's conduct violated Canons 2, 3B(7), and 4A.

A. Canon 2

Canon 2 of the Arkansas Code of Judicial Conduct provides that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Ark. Code Jud. Conduct Canon 2 (2007). Here, the Commission made several findings regarding Judge Proctor's relationships with defendants, which it concluded were violative of Canon 2.

Specifically, the Commission made findings that Judge Proctor failed to avoid the appearance of impropriety by: (1) sending money to a convicted robber that he had sentenced to the Department of Correction ("ADC"); (2) allowing a party defendant in his court to live at his personal residence for over a week; (3) allowing a party defendant in his court to live at his personal residence on certain weekends; (4) giving rides in his personal vehicle to at least eight party defendants; and (5) having inappropriate contact with party defendants subject to his jurisdiction by collecting money from them in open court, eating lunch with them, and visiting with them in chambers. It further concluded that each course of conduct constituted a willful violation of Canon 2.

The commentary to Canon 2 provides that a judge must avoid all impropriety and appearance of impropriety.[4] *See* Commentary, Ark. Code Jud. Conduct Canon 2(A). It further provides that the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out

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[4] While the commentary to the canon is not controlling over the canon's clear language, it is a highly persuasive aid to construing the canon. *See Huffman v. Arkansas Judicial Discipline & Disability Comm'n*, 344 Ark. 274, 42 S.W.3d 386 (2001).

judicial responsibilities with integrity, impartiality, and competence is impaired. *See id.*

1. Sending of money to an incarcerated defendant sentenced by Judge Proctor

Judge Proctor, in his brief before this court, argues that his sending money to Demoreo Davis did not violate Canon 2 because Judge Proctor had lost jurisdiction over Mr. Davis by the time the money was sent. Judge Proctor's argument, however, is misplaced.

We must determine, as set forth above, whether Judge Proctor's conduct, *i.e.*, sending money to a defendant sentenced to prison by Judge Proctor, would create in reasonable minds a perception that Judge Proctor's ability to carry out his judicial responsibilities with integrity, impartiality, and competence was impaired. We hold that it would. Judge Proctor admitted making several deposits, between 2006 and 2008 and totaling approximately $450, to Mr. Davis's account with ADC. He further admitted that Mr. Davis had been convicted in his court and that he had signed the judgment and commitment order.

Judge Proctor testified that the two of them exchanged letters while Mr. Davis was incarcerated

and that Mr. Davis had asked him in a letter if he could send Mr. Davis some money.

Judge Proctor stated that he thought it looked "okay" to the public for a sentencing judge to send money to a defendant sentenced by that judge. He testified that not only had he lost jurisdiction over Mr. Davis's case, but that, while he was not trying to hide his assistance, no one in the public would have known about the deposits.

Judge Proctor's arguments are unavailing, as it is patently clear that a judge's deposit of money into the account of a defendant incarcerated by that judge, irrespective of whether that judge retained jurisdiction, would create in reasonable minds a perception that the judge's ability to carry out his judicial responsibilities with integrity, impartiality, and competence is impaired. We, therefore, hold that the Commission's finding that Judge Proctor's sending money to Mr. Davis's ADC account was a willful violation of Canon 2 is not clearly erroneous, and we accept it.

2. Allowing a party defendant to live at Judge Proctor's residence for over a week

Judge Proctor does not dispute that Mr. Davis stayed with him, and the evidence before the Commission demonstrates that its finding on this issue is not clearly erroneous.

Judge Proctor admitted that Mr. Davis stayed with him at his home for over a week. He testified that Mr. Davis stayed in a spare bedroom and that the two of them watched television together, ate dinner together, and drove into the office together. Again, it is clear to this court that such conduct would create in reasonable minds a perception that Judge Proctor's ability to carry out his judicial responsibilities with integrity, impartiality, and competence was impaired, because Mr. Davis was a defendant under Judge Proctor's jurisdiction. We cannot say that the Commission's finding that such willful conduct violated Canon 2 is clearly erroneous, and we accept the finding.

3. Allowing a party defendant to live at Judge Proctor's personal residence on certain weekends

As was the case with the prior finding, Judge Proctor does not appear to take issue with the Commission's finding that he allowed a party defendant to live at his home on certain weekends. And again, the evidence demonstrates that the Commission's finding that such conduct violated Canon 2 is not clearly erroneous.

Zane Chrisman, Judge Proctor's former law clerk, testified that Judge Proctor told her that "he would take Demoreo Davis back to his house on a Friday

and would sit on him to keep him from getting high on the weekends." She testified that Judge Proctor told her that "if anybody knew that he could lose his license or lose his judgeship." Judge Proctor himself testified that Mr. Davis came to his house, sometimes two times a month. He admitted that there were times that he took Mr. Davis home with him for a weekend to ensure that he did not get high or in trouble.

Again, such conduct would clearly create in reasonable minds a perception that Judge Proctor's ability to carry out his judicial responsibilities with integrity, impartiality, and competence is impaired. Accordingly, we cannot say that the Commission's finding that such willful conduct was violative of Canon 2 is clearly erroneous, and we accept it.

4. Rides given in Judge Proctor's personal vehicle to eight party defendants

Judge Proctor challenges this finding by the Commission solely on a procedural basis, which will be discussed later in this opinion. Notwithstanding his failure to challenge the Commission's finding substantively, it is clear that the finding is not clearly erroneous.

Sally Porter, Judge Proctor's former trial assistant, case coordinator, and office manager, testified that

on several mornings, she saw Judge Proctor and Mr. Davis getting out of the car together. In addition, she testified, Judge Proctor drove Mr. Davis to lunch on occasion. With respect to other defendants, Judge Proctor testified that he had given rides to the following in his personal car: Willie Coleman, Ernest McCuen, Robert McGee, Mahoney Steele, Frances Elton, Jaslyn McCrary, and Tiwana White. He further testified that he gave these individuals rides in his car while they were on probation in his court. Finally, Judge Proctor agreed that giving such rides was not appropriate for a sitting judge.

Again, applying the test for appearance of impropriety, it is clear to this court that Judge Proctor's practice of giving rides to defendants in his personal car violated Canon 2. Indeed, Judge Proctor admitted on the record that such behavior was inappropriate. Accordingly, we hold that the Commission's finding that Judge Proctor's giving rides to party defendants in his personal car was a willful violation of Canon 2 is not clearly erroneous, and we accept it.

5. Collection of money by Judge Proctor from party defendants, eating lunch with them, and visiting with them in chambers

Judge Proctor does not address substantively the allegations that he ate lunch with party defendants and visited with them in chambers. However, he does dispute the allegation that he collected money from them.

a. Collection of money from party defendants

In his brief, Judge Proctor admits that he had contact with probationers when he collected money, but contends that his conduct did not violate Canon 2 because it was authorized by statute, specifically, Arkansas Code Annotated § 16-13-703. We disagree.

The record reveals testimony by Captain Richard Day, Judge Proctor's bailiff, that he observed Judge Proctor collecting both money and fees, such as probation fees, Cycle Breakers fees, missed-meeting fees, and drug fees, in open court. Kenny Haskin, Judge Proctor's former chief probation officer, testified that he saw Judge Proctor collect fees on occasion, and Tonia Goolsby, a prosecutor who served as the division chief for the Pulaski County Prosecutor's Office for Fifth Division, testified that she saw Judge Proctor collecting cash at a show-cause docket she attended.

Such conduct does not pass the test for appearance of impropriety. Nor does the statute relied upon by

Judge Proctor cure the appearance of impropriety. The subsections of section 16-13-703, as cited by Judge Proctor, provide in pertinent part:

> (a) When a defendant sentenced to pay a fine defaults in the payment thereof, or of any installment, the court, upon its own motion or that of the prosecuting attorney, may require him or her to show cause why he or she should not be imprisoned for nonpayment.
>
> (b) The court may issue a warrant of arrest or summons for his or her appearance.
>
> (c)(1) Unless the defendant shows that his or her default was not attributable to a purposeful refusal to obey the sentence of the court or to a failure on his or her part to make a good-faith effort to obtain the funds required for payment, the court may order the defendant imprisoned in the county jail or other authorized institution designated by the court until the fine or specified part thereof is paid.

Ark. Code Ann. § 16-13-703 (a)–(c)(1) (Supp. 2009). The plain language of the statute authorizes a circuit court to require a defendant sentenced to pay a fine to show cause where there is nonpayment; to issue a warrant or summons for the defendant's appearance; and, in certain circumstances, to order a defendant imprisoned until the nonpaid fine or specified part thereof is paid. However, none of the subsections relied upon by Judge Proctor authorize a circuit court to collect the fine itself. Because it is clear to this court that Judge Proctor's collection of money from defendants in open court would create in reasonable minds a perception that his ability to carry out his judicial responsibilities with integrity, impartiality, and competence is impaired, we cannot say that the Commission's finding that Judge Proctor's willful conduct violated Canon 2 is clearly erroneous, and we accept it.

b. Eating lunch with defendants in chambers

The Commission concluded that Judge Proctor's conduct of eating lunch in chambers with defendants subject to his jurisdiction violated Canon 2. We agree.

Here, Captain Day testified that he saw probationers eating lunch with Judge Proctor in the judge's office on several occasions. Sally Porter

testified that she heard Judge Proctor ask probationers where they wanted to eat that day. She testified that Judge Proctor drove Mr. Davis to lunch on occasion and that the two of them ate lunch in the office on occasion. Kenny Haskin also testified that probationers ate lunch with Judge Proctor on occasion at the office, and LaShannon Robinson, Judge Proctor's case coordinator, testified to the same.

Judge Proctor does not dispute the fact that he ate lunch with probationers. In fact, he, too, testified that there were occasions on which he would eat lunch with them in the office. We simply cannot say that such conduct passes the test for appearance of impropriety.

Certainly, a judge's eating lunch, in or outside of his office, with defendants within his jurisdiction would create in reasonable minds the perception that that judge's ability to carry out his judicial responsibilities with integrity, impartiality, and competence is impaired.

Accordingly, we cannot say that the Commission's conclusion that such willful conduct violated Canon 2 is clearly erroneous, and we accept it.

c. Visiting with defendants in chambers

The Commission further found that Judge Proctor's conduct of visiting with defendants in chambers was violative of Canon 2. We agree. As already set forth above, it is clear that Judge Proctor lunched with probationers in the office on occasion. In addition, Captain Day testified that he saw probationers interact with Judge Proctor in the office. Sally Porter testified that she saw Judge Proctor participating in discussions with probationers in the Fifth Division offices. She also testified that she saw probationers talking to Judge Proctor one-on-one on a daily basis. Ms. Porter testified that Judge Proctor gave probationers his direct office number and that he indicated to her that he took calls from them. Judge Proctor further admitted that probationers called him on his office phone.

Such conduct, in our view, gave the appearance of impropriety. Certainly, Judge Proctor's visiting with defendants in chambers would create in reasonable minds a perception that his ability to carry out his judicial responsibilities with integrity, impartiality, and competence is impaired. Accordingly, we cannot say that the Commission's finding on this willful violation is clearly erroneous, and we accept it.

B. Canon 3B(7)

Canon 3B(7) provides:

> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
> (ii) the judge makes provisions promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the

> judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other
> judges.
> (d) A judge may indicate or consider any ex parte communications when expressly authorized by law to do so.

Ark. Code Jud. Conduct Canon 3B(7) (2007). The commentary to the canon provides, further, that "[i]n general, . . . a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met." Commentary, Ark. Code Jud. Conduct Canon 3B(7). Here, the Commission concluded that Judge Proctor's giving defendants rides in his car, visiting with defendants at Cycle Breakers meetings, and visiting with defendants in the courthouse outside of a court setting without counsel or the State present constituted ex parte communications with defendants subject to his jurisdiction, in violation of Canon 3B(7). We agree.

As already set forth above, Judge Proctor gave defendants rides in his personal vehicles on several occasions. In addition, Judge Proctor admitted that he talked and shared with probationers during daily meetings at the Chem-Free house, a facility that was a part of Cycle Breakers. Zane Chrisman testified that Judge Proctor was at all the Cycle Breakers meetings that she could remember and that "defendants would come up to him if they had questions about their case."

Further, Captain Day testified that Judge Proctor led Bible studies in the courtroom after hours with then-current probationers. He stated that he observed the probationers sharing their thoughts with Judge Proctor. Sally Porter also testified that Judge Proctor conducted Bible studies with then-current probationers in the Fifth Division offices. She stated that she observed Judge Proctor participating in discussions with those probationers during those Bible studies.

Additionally, Zane Chrisman testified that probationers were "around" the Fifth Division offices "quite a bit." LaShannon Robinson testified that probationers were in the Fifth Division offices "[d]aily or weekly." She testified that they would run errands, move boxes, "whatever [Judge Proctor] asked them to do." Tonia Goolsby testified that

Judge Proctor encouraged defendants to have direct contact with him. She also testified that defendants were commonly in the court's staff offices. Indeed, Judge Proctor admitted that probationers were in and around his offices "[s]ometimes on a daily basis." He testified that they did jury mailouts for the court and took deposits to the bank.

It is clear from the testimony before the Commission that Judge Proctor engaged in and permitted ex parte communications with then-current defendants subject to his jurisdiction in violation of Canon 3B(7). Moreover, it is evident that the ex parte communications do not fall within the exceptions set forth in the canon, as they were not for scheduling, administrative purposes, or emergencies. Even if the ex parte communications could be considered administrative, there was no evidence that Judge Proctor complied with the canon in making provisions promptly to notify all other parties of the substance of the ex parte communications and in allowing an opportunity to respond. Nor were the communications with a disinterested expert on the law, with court personnel, or authorized by the law. For these reasons, the Commission's finding that Judge Proctor's conduct of willfully engaging in ex parte communications is not clearly erroneous, and we accept it.

C. Canon 4A

The Commission further found that Judge Proctor willfully violated Canon 4A by stating that he knew he might lose his judicial office based on his actions regarding defendants subject to his jurisdiction and by allowing his personal interests regarding rehabilitating criminals to be superior to his sworn duty as a judge. Canon 4A relates to a judge's extrajudicial activities and subsection A provides:

> A. *Extra-judicial Activities in General.* A judge shall conduct all of the judge's extra-judicial activities so that they do not:
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
> (2) demean the judicial office; or
> (3) interfere with the proper performance of judicial duties.

Ark. Code Jud. Conduct Canon 4A.

1. Statements by Judge Proctor that he might lose his judicial office

This canon, by its plain language, pertains to a judge's extrajudicial activities. Certainly, Judge Proctor's involvement with the Cycle Breakers

program would be considered an extrajudicial activity. In this case, a video was presented to the Commission of Judge Proctor speaking at a Cycle Breakers awards ceremony. During that speech, Judge Proctor made comments regarding his involvement with Mr. Davis and stated that, as a result of that involvement, his judgeship was under "question and scrutiny." He then stated that even if he were to lose his judgeship over the matter, "it would be worth it." The question presented, then, is when Judge Proctor made his statement regarding the loss of his judicial office, did he conduct his extrajudicial activity such that it did not cast a reasonable doubt on his capacity to act impartially as a judge?

It is reasonable to construe Judge Proctor's statement as one of indifference toward his judicial obligations. Yet, the commentary to the canon provides, in pertinent part, that "[e]xpressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge." Commentary, Ark. Code Jud. Conduct Canon 4A. While the commentary in no way limits expressions to bias or prejudice, even those expressions only "may" cast reasonable doubt.

They do not per se cast reasonable doubt. Accordingly, because Judge Proctor's statement

merely rises to the level of indifference, we cannot say that it cast reasonable doubt on his capacity to act impartially.[5] Therefore, we hold that the Commission's conclusion 5 that Judge Proctor's statement violated Canon 4A is clearly erroneous, and we reject it.[6]

2. Allowing personal interests to be superior to sworn duty as a judge

Judge Proctor argues that his motives were pure and therefore justified him having these extrajudicial contacts with probationers. Such an argument demonstrates Judge Proctor's belief that his duties as a judge are subordinate to his personal beliefs. Canon 4A(3)'s plain language requires that a judge conduct his extrajudicial activities so that they do not interfere with the proper performance of his judicial duties. Judge

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[5] Because the Commission failed to specify which subsection of Canon 4A Judge Proctor's conduct violated, we have reviewed his conduct under the subsection we determined most applicable. Judge Proctor's statement that he might lose his judicial office based on his actions does not appear alone to demean the judicial office, nor interfere with the proper performance of judicial duties. Therefore, we have analyzed the finding under Canon 4A(1).

[6] We note that this rejection in no way precludes us from considering the statements in the context of other violations.

Proctor's continuous, inappropriate conduct with probationers, both inside and outside of the courtroom, demonstrates that Judge Proctor put his personal beliefs above his judicial duties.

Accordingly, we hold that the Commission's finding that Judge Proctor allowed his personal interests in rehabilitating criminals to be superior to his judicial duties was a willful violation of Canon 4A is not clearly erroneous, and we accept it.

II. Involvement with Cycle Breakers

The next issue for this court's consideration is the propriety of Judge Proctor's involvement with and relationship to the Cycle Breakers program. The Commission found that Judge Proctor's involvement in Cycle Breakers was improper and violated Canons 2B, 4A, and 4C.

A. Canon 2B

Canon 2B provides:

> A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the

> prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Ark. Code Jud. Conduct Canon 2B. Here, the Commission found that Judge Proctor prepared a "profit & loss" statement for the Fifth Division Circuit Court and sent it to the bank for a determination of Cycle Breakers, Inc.'s credit worthiness, and it concluded that such conduct willfully violated Canon 2B. Judge Proctor takes issue with this finding, not disputing that he prepared the statement, but arguing that the finding is clearly erroneous because the document he provided to the bank was a record used to provide accounting information to the Pulaski County Clerk. He claims that the record was generated from software he helped create and that it was the most accurate source of information regarding fees because it tracked all payments made by probationers to both Pulaski County and Cycle Breakers. For these reasons, he asserts, it was not improper for him to provide the information to the bank. Judge Proctor's contentions are misplaced, as it matters not what

was presented or why.

It is clear from the record that Judge Proctor presented a profit and loss statement, as evidenced by his admission thereto during the following colloquy:

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: And then you present historical profit and loss statements out of your division to the bank, correct?

JUDGE PROCTOR: That's right. I sure did.

Judge Proctor further admitted that he presented the statement so that the bank could rely upon it to determine how much money would be available to pay on a mortgage Cycle Breakers was seeking. By making such a presentation while a judge, no matter the reason, Judge Proctor lent the prestige of judicial office to advance the private interests of Cycle Breakers, Inc., which is a clear violation of Canon 2B. Therefore, we hold that the Commission's finding that Judge Proctor willfully violated Canon 2B on this basis is not clearly erroneous, and we accept it.

B. Canon 4A

The Commission further found that Judge Proctor willfully violated Canon 4A in two ways: (1) he involved himself in the operation of Cycle Breakers, Inc., to the extent that it cast reasonable doubt on his capacity to act impartially as a judge; and (2) he involved himself personally with party defendants in his court to the extent that it cast reasonable doubt on his capacity to act impartially as a judge. As already set forth above, Canon 4A provides:

> A. *Extra-judicial Activities in General.* A judge shall conduct all of the judge's extra-judicial activities so that they do not:
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
> (2) demean the judicial office; or
> (3) interfere with the proper performance of judicial duties.

Ark. Code Jud. Conduct Canon 4A.

1. Involvement in the operation of Cycle Breakers, Inc.

The evidence before the Commission amply demonstrates that Judge Proctor was involved in the operation of Cycle Breakers, Inc. The question,

then, is[7] did his involvement cast a reasonable doubt on his capacity to act impartially as a judge? We conclude that it did.

Captain Richard Day testified that he saw Judge Proctor involved in Cycle Breakers activities, such as "[c]onferencing, financial, consulting, counseling, all of them." He stated that Judge Proctor collected both money and fees, including probation fees, Cycle Breakers fees, missed-meeting fees, and drug fees.[8] He further testified that Judge Proctor talked with probationers, taught classes to current probationers, and had computer programs on his office computer for Cycle Breakers, Inc.'s finances. In addition, he testified that Judge Proctor stated at a Cycle Breakers staff retreat that Cycle Breakers's goal was to collect $250,000 in fees.

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[7] It appears that there is no real distinction between Cycle Breakers and Cycle Breakers, Inc. During his testimony before the Commission, Judge Proctor agreed that Cycle Breakers and Cycle Breakers, Inc. "shared the exact same purposes, goals, principles, things of that nature" and that they "mirrored each other."

[8] Captain Day described the missed-meeting fee as a hundred-dollar fee that any probationer who failed to attend a Cycle Breakers or mandatory meeting was fined. He described a drug fee as the cost for having a drug test performed.

Zane Chrisman testified that Judge Proctor was present at certain Cycle Breakers meetings and that, while there, defendants would ask him questions about their cases. She testified that Judge Proctor had access to blank Cycle Breakers checks and that she saw him involved in activities with Cycle Breakers money. She further testified that she made deposits for Cycle Breakers, Inc., and that the Cycle Breakers, Inc. checkbook was kept in his office.

Bruce Engstrom, a certified public accountant testifying for the Commission, stated that, on Cycle Breakers, Inc. tax returns for 2003 and 2004, Judge Proctor was listed as an officer, director, trustee, and key employee. In addition, bank statements for Cycle Breakers, Inc., were mailed to Judge Proctor's office, its address on a tax return was the same as Judge Proctor's office, and its webpage was listed as www.co.pulaski.ar.us/fifthdivisioncircuit.

Alice Abson, who at one time served as director of Cycle Breakers while a full-time employee of Fifth Division,[9] testified that Judge Proctor took over the responsibilities for the Cycle Breakers account. She stated that he decided what were necessary purchases for Cycle Breakers and that he conducted and ran the mandatory, quarterly meetings for probationers.

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[9] Ms. Abson testified that she was paid through the county.

She testified that Judge Proctor was in charge of the minutes for the Cycle Breakers, Inc. board meetings and that he would take them and type them. Ms. Abson further testified that Judge Proctor would go to the Cycle Breakers board and make requests for certain purchases, for which he would receive permission. In addition, she testified that she and Judge Proctor met with community leaders, church leaders, and leaders of other civic organizations on behalf of the Cycle Breakers program. She stated that Judge Proctor appointed Sally Porter as comptroller of Cycle Breakers and that Ms. Abson and Judge Proctor set up the bank accounts for Cycle Breakers, Inc. Finally, Judge Proctor himself admitted to his involvement with Cycle Breakers.

While claiming it was a mistake, Judge Proctor admitted being listed on at least two Cycle Breakers tax returns as an officer. He stated that he attended eighty-five percent or more of the Cycle Breakers monthly meetings, as well as the annual meetings of Cycle Breakers, Inc. He admitted to preparing annual minutes for Cycle Breakers, Inc., to opening its annual meetings in 2004 and 2005, and to giving a history of the organization at its 2005 and 2006 meetings. He admitted that his name, office address, and email were listed on the Cycle Breakers website and that there were blank

and signed Cycle Breakers checks kept in a locked file in his office.

In addition, Judge Proctor admitted to hosting Cycle Breakers, Inc.'s board of directors; obtaining services for volunteers, mentors, security, catering, and speakers for Cycle Breakers, Inc.; serving as master of ceremonies for Cycle Breakers quarterly meetings; serving as host for its annual meetings; paying bills for expenses of Cycle Breakers, Inc.'s operations; creating computer software used by Cycle Breakers, Inc.; and helping to prepare and clean the Chem-Free house.

Here, the foregoing testimony clearly sets forth Judge Proctor's involvement with Cycle Breakers. In addition, Judge Proctor agreed that ninety-nine percent of the people in the Cycle Breakers program were there under his authority from the Fifth Division. These facts, accordingly, support the Commission's finding that Judge Proctor willfully violated Canon 4A by involving himself in the operation of Cycle Breakers, Inc. to the extent that it cast reasonable doubt on his capacity to act impartially as a judge. We hold that the finding is not clearly erroneous, and we accept it.

2. Involvement with party defendants

As already set forth in this opinion, Judge Proctor admitted making several deposits into the ADC account of a defendant convicted in his court. He permitted this same defendant to stay in his home, and he gave several defendants rides in his personal vehicle.
In addition, Sally Porter testified that Judge Proctor led Bible studies for probationers and that he took probationers with him to church. Judge Proctor testified that he hosted a function at his home that probationers attended and at which he was present. He further testified that he baptized some persons who were current probationers and that he allowed some probationers to work on his home as part of an entrepreneurial project for Cycle Breakers, Inc. Judge Proctor admitted that Demoreo Davis, a probationer, called him on his cell phone, and that he personally reimbursed an employee for buying Mr. Davis clothes.

Without question, such extrajudicial activities cast reasonable doubt on Judge Proctor's capacity to act impartially as a judge. Accordingly, we cannot say that this finding of a willful violation by the Commission is clearly erroneous, and we accept it.

C. Canon 4C

With respect to Canon 4C, the Commission found two violations by Judge Proctor: (1) that he served

as an officer, director, trustee, or nonlegal advisor of an organization that was engaged in proceedings that ordinarily came before the judge; and (2) that he willfully lent the prestige of judicial office to a private corporation by preparing a "profit and loss" statement for the Fifth Division and sending it to a bank for a determination of the credit worthiness of Cycle Breakers, Inc. Canon 4C provides:

C. *Governmental, Civic or Charitable Activities*
(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice. (Amended July 1, 2004)

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.
(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable,

fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in

Section 4C(3)(b)(i), if the membership solicitation is essentially a fundraising mechanism;
(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Ark. Code Jud. Conduct Canon 4C.

1. Service as an officer, director, trustee, or nonlegal advisor

It appears that the Commission's finding is that Judge Proctor violated Canon 4C(3)(a)(i), which is set forth above. Thus, we must examine: (1) whether Judge Proctor served as an officer, director, trustee, or nonlegal advisor to Cycle Breakers, Inc., and (2) whether Cycle Breakers, Inc., was likely to be engaged in proceedings that would ordinarily come before him. Indeed, Bruce Engstrom testified, and Judge Proctor admitted, that Judge Proctor was listed on two Cycle Breakers tax returns as "officer, director, trustee, and key employee."

Moreover, based on the facts set forth earlier, it is clear that Judge Proctor acted in some capacity on behalf of Cycle Breakers, as evidenced by his control over the Cycle Breakers checking account and checks; his acceptance of Cycle Breakers fees; his participation in seeking mentors for the

program; his presentations to Cycle Breakers participants; his presence at, participation in, and presentations during Cycle Breakers board meetings; and his payment of bills for expenses of Cycle Breakers. Accordingly, such involvement indicates Judge Proctor's service as an officer, director, trustee, or nonlegal advisor to Cycle Breakers.

However, to accept the Commission's finding on this violation, we must also determine that it was likely that Cycle Breakers would be engaged in proceedings that would ordinarily come before Judge Proctor. Here, Judge Proctor testified that he had fifteen percent of the total criminal docket for the Sixth Judicial District. Kenny Haskin, who served as Judge Proctor's chief probation officer, testified that the purpose of Cycle Breakers was to "provide rehabilitation type services to probationers who are on probation through Fifth Division." In light of this testimony, there is no doubt that it was likely that Cycle Breakers would be engaged in proceedings that would ordinarily come before Judge Proctor. And, again, Judge Proctor admitted that ninety-nine percent of the people in Cycle Breakers were there under his authority from the Fifth Division. Thus, Cycle Breakers was indeed engaged in proceedings that ordinarily came before Judge Proctor. Because it is

clear from the evidence before the Commission that Judge Proctor served, at a minimum, as a nonlegal advisor to Cycle Breakers, an organization that was likely to be, and was, engaged in proceedings that would ordinarily come before Judge Proctor, the Commission's finding that such conduct violated Canon 4C is not clearly erroneous, and we accept it.

2. Preparation of a profit and loss statement

As already set forth previously, Judge Proctor admitted presenting a profit and loss statement to the bank, and by virtue of doing so while a judge, lent the prestige of judicial office to Cycle Breakers. Arkansas Code of Judicial Conduct Canon 4C(3)(b)(iv) precludes a judge as an officer, director, trustee, or nonlegal advisor from using or permitting the use of the prestige of judicial office for fundraising or membership solicitation. Because we have already held that Judge Proctor served as an officer, director, trustee, or nonlegal advisor to Cycle Breakers, and because in that capacity, he permitted the use of the prestige of judicial office to acquire funds for Cycle Breakers, we hold that the Commission's finding of a willful violation of Canon 4C is not clearly erroneous, and we accept it.

III. Coercion of Staff

The Commission further found that Judge Proctor willfully violated Canon 3B(4) by coercing his staff into working for Cycle Breakers, Inc. Canon 3B(4) provides:

A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Ark. Code Jud. Conduct Canon 3B(4).

Our review of the record reveals ample evidence that Judge Proctor's staff was required to work with and for Cycle Breakers. Indeed, Captain Day testified that Judge Proctor told him that he had to attend Cycle Breakers events. He stated that he was the security for the staff at the Cycle Breakers meetings and that most of the Fifth Division staff attended the monthly, weekly, and Saturday meetings "[b]ecause we were told that we either be there or be fired" by Judge Proctor. He testified that staff were paid overtime by the county and then were later paid by Cycle Breakers for that work. He further stated that Judge Proctor ordered them to work for Cycle Breakers.

Kenny Haskin testified that "it was strongly encouraged that [staff] attend" Cycle Breakers

meetings. Zane Chrisman testified that Judge Proctor requested that she pick up intensive probationers and "take them to class." She testified that at times she used her own car and other times she used Judge Proctor's car. She further testified that when she interviewed with Judge Proctor for her position as a law clerk, he and his then-law clerk talked to her about the fact that Cycle Breakers would be part of her job responsibilities. Specifically, she was told that she was required to work at the probationers' quarterly, mandatory meetings, which were held on Saturdays.

The foregoing testimony makes clear that Judge Proctor required his Fifth Division staff to work on Cycle Breakers matters. That being said, we disagree with the Commission that such conduct violates the plain language of Canon 3B(4). However, that is not to say that Judge Proctor's actions were not without a basis for disciplinary action. According to Ark. Jud. Discipline & Disability Comm'n R. 12E, this court "may accept, reject, or modify in whole or in part, the findings and recommendation of the Commission." We, therefore, modify the Commission's finding. Specifically, we hold that the finding should be modified to read as follows:

Judge Proctor willfully violated Canon 2 by requiring his staff to work for Cycle Breakers, Inc.

Canon 2, as already set forth, mandates that judges avoid impropriety and the appearance of impropriety, and the test for appearance of impropriety, as set forth in the commentary and above, is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired. It is evident to this court that Judge Proctor's requirement that his Fifth Division staff work for Cycle Breakers constituted such conduct. Accordingly, while we reject the Commission's finding that his conduct regarding his staff violated Canon 3B(4), we modify the Commission's finding to a willful violation of Canon 2.

IV. Imposition of Civil Probation

As to its final findings, the Commission found that Judge Proctor willfully violated Canon 2A in two ways: (1) by failing to respect and comply with the law by ignoring and bypassing laws that were an impediment to his interest in Cycle Breakers, Inc.; and (2) by failing to respect and comply with the law by enforcing payment of "civil fees" from defendants with jail or the threat of jail, knowing the money would go to his nonprofit corporation. Canon 2A provides:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Ark. Code Jud. Conduct Canon 2A.

A. Ignoring and Bypassing Laws

Here, Judge Proctor conceded that he created "civil probation" in his court. He further admitted that, when expunging records, he erroneously sealed the records of some defendants who had been convicted of violent offenses.[10] In addition, Kim Williams, a deputy in the Division of Legislative Audit, testified that her office was asked to examine the dealings of the Fifth Division and Cycle Breakers. She testified that there was concern over Judge Proctor's assessment of probation fees. She testified, as follows:

[T]he Arkansas Codes (sic) allow a probation fee to be assessed and collected.
And, in this instance, Judge Proctor's monthly probation fee was $40.00 and that was collected in their office, remitted to the County Circuit Clerk, who in turn turned that money over to the County Treasurer, which is to help offset the costs for the

[10] *See, e.g.*, Ark. Code Ann. § 16-93-1207(b)(1) (Supp. 2009).

probation officers and the expenses that the County incurs.

> Then, there was a – later in 2006, Judge Proctor issued a Circuit Court order that half of these fees go to Cycle Breakers, Incorporated. Cycle Breakers,
> Incorporated had requested that half the fees, or a $20.00 fee, be assessed for a building fund so they could acquire a building. This was submitted to the
> Judge and he in turn issued an order saying that half these fees would now go to the Cycle Breakers program and half to the County. Well, the Quorum Court objected to that because these fees, according to the law, are fees that go to the county. They're county public funds and the Constitution prohibits any public entity, like a county or a city, to give funds to a nonprofit organization, unless they are providing some service for the county that they are not able to provide. And there was no agreement to that nature. It was our opinion that a Circuit Judge did not have the power to override a state law and we basically say that in the report, that

> those fees should never have gone to Cycle Breakers.

In addition, she testified that

> there was a civil probation fee of $40.00 a month, and we could not find any statutory authority for a civil probation fee. There's the authority for the $40.00 probation fee but not if you're – if you're put on – there's no civil probation that we found in the laws. And this fee went to the program. This fee was not used as part of the probationary process. There were $100.00 fees for missing a meeting of the Cycle Breakers, drug testing fees, monitoring fees, adjudication monitoring fees (sic).

Tonia Goolsby also testified regarding the lack of statutory authority. She testified that she did not know what civil probation was. She stated that she asked Judge Proctor's law clerk for a statute on the process that was being used, but that the law clerk did not have one. She further testified that, likewise, she could not find any authority or statutory scheme authorizing the process.

In addition, Ms. Goolsby testified that she had concerns that people were facing hearings in front

of Judge Proctor without proper representation by counsel. She testified that

> [t]he concern that I had was that typically, even in a contempt hearing, that there's some sort of I guess issuance of a piece of paper that indicates to
> everybody that that person is facing a hearing and it would be a show-cause type of paper or revocation hearing or something. And the person would come in and they would have an attorney – or even if they didn't have an attorney, if it was a contempt, they'd have an opportunity to say to the Judge why they were or were not in compliance. And then they might, you know, be taken into custody if the court found them in contempt. And it just seemed like in 5th Division the procedure was if you didn't comply in some way the court issued an arrest warrant for you, a letter to the jail for you to be held for whatever amount of time, and then you might be brought over on the jail docket. And I would look all those people up in court and they'd be in custody, they'd be there, they didn't have a lawyer, they didn't

> have a revocation. So what they were there on was a contempt matter but they'd already been in custody for 10 or 20 or 30 days. And the discussion was that they needed to owe and they needed to go to the meetings and what they were going to have to do to get out. And I spoke a number of times to the public defenders in that court and to Bill Simpson about the situation because I was concerned about that.

She further testified to concerns regarding the expungement of cases by Judge Proctor. She stated that she knew of cases that were sealed without a petition being filed. She stated that

"[t]here were cases in which either someone asked the court or the court directly went ahead and entered an Order to seal those files, in which a petition was not filed or we were not notified."[11]

It is clear to this court that, in addition to any other laws Judge Proctor may have ignored or bypassed, Judge Proctor created and imposed a new type of sentence–civil probation. However, sentencing is entirely a matter of statute in Arkansas, and a circuit court may only impose a sentence

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[11] *See, e.g.*, Ark. Code Ann. § 16-90-904 (Supp. 2009).

authorized by statute. *See Cross v. State*, 2009 Ark. 597, ___ S.W.3d ___. Moreover, a circuit court lacks the authority to sentence a defendant otherwise than in accordance with Chapter 4 of the Arkansas Criminal Code. *See id.* Based on the foregoing testimony before the Commission, it is evident that Judge Proctor ignored and bypassed, at a minimum, our sentencing laws and that such conduct did not promote public confidence in the integrity and impartiality of the judiciary. Accordingly, we hold that the Commission's finding of a willful violation of Canon 2A is not clearly erroneous, and we accept it.

B. Enforcement of "Civil Fees"

As noted, the Commission found that Judge Proctor willfully violated Canon 2A by failing to respect and comply with the law by enforcing payment of "civil fees" from defendants with jail or the threat of jail, knowing the money would go to his nonprofit corporation. A review of the record reveals plenty of testimony that Judge Proctor imposed fees, with jail or the threat of jail, knowing that they would go to Cycle Breakers.

Captain Day testified that Judge Proctor had a "'pay or stay' thing." He testified that probationers either had to pay their fees or go to jail. He later stated that if a probationer had not paid a fine or

had not paid restitution, then that probationer ran the risk of being put in jail.

Sally Porter testified that Judge Proctor used an "adjudicative monitoring fee." She described the fee and its use, as follows:

It's where if you were sentenced – because Pulaski County jail was overcrowded, so therefore they couldn't go, you know, to jail. So Judge would assess them an adjudicative monitoring fee so that you could stay out until there was a bed available. I was responsible for that program. And the way it worked is once he let them stay out on the adjudicative monitoring fee, I placed their name on the list, they came into my office, got their cell number their mom, their nearest contact numbers. And then once [I was notified] that there was a bed, I would contact that defendant and let them know and they had x-amount of hours to get here so that they could go to jail. But they had to pay every week until they did.

. . . .

If you didn't pay, then you go to jail. You pay or you stay.

Ms. Porter stated that she had seen defendants go to jail on show-cause days, with no attorney present and no court reporter. She further stated that people went on civil probation after their criminal

cases were closed and still had to pay and appear for show-cause days.

Zane Chrisman described the civil-probation policy: And then there was the civil probation policy that if – the way that that was pretty much set up was I think if you had paid all of your fees and you'd pretty much done everything that you were supposed to do during . . . your probationary term that you could be eligible for civil probation. And at that point you would be allowed to have your file sealed, but then for the next year you would still be required to do the Cycle Breakers meetings. You just wouldn't have to show up with your probation officer every month.

She further testified that on show-cause days, the collection of fees included Cycle Breakers, Inc. fees. She stated that a defendant could still be paying Cycle Breakers fees even though his case was technically expunged.

Tonia Goolsby testified that there were "a lot of fees" going to Cycle Breakers. She stated:

[W]hen I first got into court I didn't know what Cycle Breakers meant. And so the defendants would be assessed to pay, for instance, "you owe $100.00 in fees and you owe $100.00 to Cycle Breakers." And I didn't really know what that

meant and that just became – that was very common language in the court. And I started understanding over time that there was a division of collection for regular typical probation fees for Pulaski County and fees that were being assessed to the corporate entity of Cycle Breakers.

She testified that, many times, the fees were the subject of noncompliance for a probationer. She further testified that she saw Judge Proctor tell a defendant how much he owed and ask him if he had it. She stated that the defendant would then take cash out of his pocket and give it to a member of the court staff or the probation staff.

As already noted, Ms. Goolsby testified that the procedure in Fifth Division was very different from other divisions. During her testimony, Ms. Goolsby examined a docket sheet from Fifth Division that was admitted into evidence and reflected some notations. She testified that the notations indicated that, following the entry of an order to seal in the case in 2005, a contempt of court warrant was sought for the defendant in August 2007. She further testified that more payments were indicated in October 2007, and that the docket further stated "Defendant is to pay $90.00 on CB and come back in a week or two weeks."

Finally, Judge Proctor testified that there were around twenty-nine probationers who would be monitored and from whom fees would be collected even though their cases were closed. He testified that they were still paying fees to a private corporation and being monitored by the court after their records had been sealed. He further conceded that some of them could have been jailed for civil contempt for fees they owed to Cycle Breakers or for restitution.

In light of this testimony before the Commission, we agree that Judge Proctor failed to respect and comply with the law and failed to promote public confidence in the integrity and impartiality of the judiciary when he enforced the payment of civil fees, knowing that the funds would go to Cycle Breakers. For this reason, we hold that the Commission's finding of a willful violation of Canon 2A on this basis is not clearly erroneous, and we accept it.

V. Judge Proctor's Procedural Arguments

A. Failure to Comply with Rule 11A

With respect to his procedural arguments, Judge Proctor first argues that the Commission's recommendation of removal should not be followed due to the Commission's noncompliance with Ark.

Jud. Discipline & Disability Comm'n R. 11A (2007), which provides:

The Commission shall, upon receipt of the judge's response or upon expiration of the time to answer, schedule a public hearing not less than thirty (30) nor more than forty-five (45) days thereafter, unless continued for good cause shown. The judge and all counsel shall be notified promptly of the date, time, and place of hearing.

Judge Proctor makes two assertions of error under Rule 11A: (1) that the initial date for his hearing was set outside of the forty-five day limit; and (2) that he was not provided prompt and correct notice of a continuation of that hearing date because he was not personally notified and the notice provided to his attorneys did not specify the time and place of the hearing as required by the rule. His contentions do not warrant dismissal.

As an initial matter, our review of the record reveals that Judge Proctor's latter argument is not preserved for our review. On March 11, 2009, April 27, 2009, and May 22, 2009, Judge Proctor moved to dismiss the cases against him, asserting that the Commission failed to schedule his hearing within the time constraints of Rule 11A. However, a review of those motions and his briefs in support reveals no mention of the Commission's failure

to notify him personally, nor its failure to indicate the time and place of the hearing in its notice. Consequently, this court is precluded from reviewing those claims, as he has failed to preserve those arguments. *See Thompson, supra.*

We turn, then, to his former argument. Attached to Judge Proctor's initial motion to dismiss is a copy of a letter from the Executive Director of the Commission, which states, in pertinent part:

Pursuant to Rule 8 of the Rules of Procedure of the Arkansas Judicial Discipline & Disability Commission, on September 19, 2008, the Commission met and considered the allegations against you contained in the referenced complaints. The enclosed Statement of Allegations alleges or infers that you wilfully (sic) violated the Code of Judicial Conduct. The Commission found sufficient cause to proceed to a Formal Disciplinary Hearing in accordance with Rule 11D.

The finding of sufficient cause to proceed to a formal disciplinary hearing is not to be taken as any determination that you violated the Arkansas Code of Judicial Conduct.

The Commission requests that you, with your attorneys, be present at its January 16, 2009 meeting to discuss this matter in the Commission

offices in Little Rock, Arkansas pursuant to Rule 11A of the Commission's rules. Please be present at 11:30 a.m.

Judge Proctor claims that this setting was not in accordance with Rule 11A, as it was outside of the time constraints of the rule. He does not claim a violation of due process, but, instead, appears to claim that the Commission failed to strictly comply with its rule. Judge Proctor is correct; the Commission clearly scheduled the date for the hearing prior to its receipt of the judge's response or the expiration of the time to answer. The letter sent by the Commission was dated October 28, 2008, and Judge Proctor's response to the statement of allegations was received by the Commission on November 17, 2008. According to the rule, the Commission should have then promptly scheduled the hearing not before December 17, 2008, but not later than January 2, 2009.[12] Thus, the Commission's scheduling did violate the rules, in two ways: (1) the Commission scheduled the hearing even before receiving the judge's answer or the expiration of time to answer; and (2) it scheduled the hearing outside of the time constraints of the rule.

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[12] The forty-fifth day was January 1, 2009; however, that day was a holiday. Pursuant to Rule 6 of the Arkansas Rules of Civil Procedure, the Commission could have scheduled the hearing as late as January 2, 2009.

That being said, this court has never held, nor do we now hold, that the Rules of Procedure of the Arkansas Judicial Discipline and Disability Commission require strict compliance by the Commission. The Commission construes Judge Proctor's claim as a jurisdictional argument, as do we.[13] However, there is nothing contained within Rule 11A to suggest that its requirements are jurisdictional in nature. Nor has Judge Proctor pointed this court to any harm he suffered by the Commission's noncompliance. For these reasons, despite the Commission's failure to comply with Rule 11A, Judge Proctor's argument is without merit.[14]

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[13] The Commission further asserts that the dates scheduled were agreed to by Judge Proctor's counsel; however, we note that there is absolutely nothing in the record that so demonstrates, nor was counsel for the Commission able to direct this court to such during oral argument. The Commission also makes the statement in its brief and referenced in oral argument that it is afforded discretion; we have never so held, nor do we now.

[14] We note that we are troubled by the Commission's repeated failure to follow its own rules, as evidenced in this opinion and in *Simes*, *supra*, and we, therefore, take this opportunity to caution the Commission to follow its rules as written. While to date the Commission's noncompliance has not resulted in a violation of a judge's rights, the Commission should take pains in the future to follow its rules and to document its actions

B. Failure to Comply with Rule 8D

Judge Proctor next contends that the Commission failed to comply with Ark. Jud. Discipline & Disability Comm'n R. 8D (2007), which provides:

Except upon good cause shown and with the approval of the Commission, no action other than dismissal of the complaint shall be taken as to any complaint about which the judge is not notified within ninety (90) days of the receipt of such complaint.

He claims that because he was never served with notice of case 2007-306, which involved allegations pertaining to the findings of the Legislative Joint Auditing Committee, that complaint should have been dismissed. He contends that, despite the Commission's dismissal of that case, certain findings of the Commission mirror statements within the report. Therefore, he claims, due process has been offended where the Commission made findings based upon a case of which he was not properly given notice.

The Commission counters, asserting that the opening of a case file on the report pursuant to Ark. Jud. Discipline & Disability Comm n R. 8A merely

triggered an investigation. It contends that once the investigation demonstrated grounds to proceed, Judge Proctor was notified of the complaint, he answered, and the case proceeded to a hearing. It avers that there was no prejudice in its consideration of the findings of the report and that the report merely formed the basis for further investigation, which led to the eventual formal so as to preclude future allegations of rule violations and to better facilitate this court's review of alleged rule violations if and when those allegations are made.statement of allegations.

It appears from the record that case 2007-306 did involve the legislative audit report. It is further evident from the record that the Commission composed a letter, dated September 24, 2007, to notify Judge Proctor of the complaint involving the audit by the Legislative Joint Auditing Committee. In addition, there is a document, dated July 18, 2008, entitled "Notice" that includes what appears to be the Commission's allegations against Judge Proctor and its recommendation to proceed to a probable-cause hearing. That document contains the following statement, under the heading "Findings of Legislative Audit":

Many of the issues from the findings of the Legislative Joint Auditing Committee (August 1, 2007) are intertwined in the above listed issues.

The findings and issues from that report will be part of the JDDC case against Judge Proctor. There are numerous areas of alleged judicial misconduct raised in the report.

On that same date, Judge Proctor filed a motion to dismiss, in which he asserted that he never received notice of case 2007-306.[15] In the motion, he argued 15 that case 2007-306 should be dismissed pursuant to Ark. Jud. Discipline & Disability Comm'n R. 8D. During a hearing held the same day, which was deemed an "initial appearance," Judge Proctor made the same argument. The Commission then voted to proceed to a probable-cause hearing and gave the Executive Director thirty days to respond to the motion to dismiss.

At the probable-cause hearing held October 10, 2008, the Commission denied Judge Proctor's motion to dismiss. However, following its deliberations on probable cause, the following colloquy was had regarding the report of the Legislative Joint Auditing Committee:

COMMISSION MEMBER JAMISON: The Commission decided to dismiss findings

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[15] Judge Proctor also asserted other arguments not relevant to this point.

of Legislative –

COMMISSION MEMBER WILLIAMS: (Inaudible) didn't make any recommendations on Findings of Legislative Audit. There was no Canon that he alleged that he violated on that. I thought that was what our vote was.

COMMISSION MEMBER JAMISON: I thought we voted to – to dismiss.

COMMISSION MEMBER MORRIS: We did.

COMMISSION MEMBER WILLIAMS: Oh, okay.

It is evident from the record that the Commission dismissed case 2007-306. Accordingly, we need not address Judge Proctor's Rule 8D argument because he received the relief he now requests, and the issue is, therefore, moot. *See, e.g.*, *Henson v. Wyatt*, 373 Ark. 315, 283 S.W.3d 593 (2008) (per curiam).

There remains still his argument that the use of the report during the Commission's deliberations on the remaining cases violated his due process rights. However, a review of the record reveals that Judge Proctor's objections to the testimony of Kim Williams, the author of the report, and to the admission into evidence of the report itself, were not based on due process.

During the disciplinary hearing, the following colloquies took place:

COUNSEL FOR JUDGE PROCTOR: Your Honor, it's my understanding Ms. Williams is the one who conducted the legislative audit regarding the activities of Cycle Breakers. It's my understanding that that particular count has been dismissed and so, therefore, we do not see the relevance of this testimony that's going to be coming in at this point. If that count is dismissed, then why are we even dealing with it?

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: Your Honor, she's going to give information about the financial arrangements between Cycle Breakers and 5th Division and the Judge, which is clearly – part of the allegations are the connection between the Judge and his intimate dealings with Cycle Breakers.

And that's part of the legislative audit report and certainly is relevant to these proceedings.

COUNSEL FOR JUDGE PROCTOR: Well, the point is that particular count, as it relates to the legislative audit – there was a legislative audit that was conducted that found that there were various things that Cycle Breakers was doing. And so the

Judge has made – obviously made some changes regarding that particular audit. And so – and if that particular count has been dismissed, then we don't really see the relevance of it, of her testimony.

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: The only thing that was dismissed was there was a heading that just said Legislative Audit and it described what happened. It wasn't really an allegation. It was just a legislative audit, and so they didn't find that as an individual count to go forward on. However, everything she's going to testify to is directly relevant to the financial dealings of Cycle Breakers, the Judge's involvement, and the report as well is relevant.

CHAIRMAN JAMISON: I am going to allow this witness to testify.

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: Thank you.
COUNSEL FOR JUDGE PROCTOR: Note my objection.

. . . .

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: Ms. Williams, I'm going to
show you some documents. I'm going to show you what has been marked as Petitioner's Exhibit Number Fourteen (14). Can you identify that?

MS. WILLIAMS: Yes sir. This is the report that we issued after we did all of our fieldwork on the Cycle Breakers and the Court. This report was released on April 1st, 2007.

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: And it's the official government report on this?

MS. WILLIAMS: Yes. This is the official report. This is the report that we went over with Judge Proctor and it's on our website.

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: I move to introduce Number Fourteen (14).

COUNSEL FOR JUDGE PROCTOR: Your Honor, we would object as far as with the admission of Exhibit Number Fourteen (14). Number one, this report contains conclusory legal statements, legal opinions, and also opinions about the ultimate issue. Ms. Williams is here to testify and she can certainly testify
about what she was required to do or asked to do as far as findings are concerned. But to allow this report to come in would be – we certainly object
to it on the grounds that the report contains legal conclusions and she's not a lawyer to give

testimony about that. And also it goes to the ultimate issue that this counsel is asked to return.

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: I don't believe it goes to the ultimate issue.

COUNSEL FOR JUDGE PROCTOR: And also it's hearsay, Your Honor. We would object to that.

COMMISSION'S DEPUTY EXECUTIVE DIRECTOR: It's a self-authenticating government document that's not hearsay. So that's not the problem. And it presents information to the panel that's helpful. Any legal conclusions, we are not asking that this to be (sic) binding upon the Committee (sic) at all. You have to apply it to the Canons. This is completely to do with accounting principles and we asked it to be allowed as evidence for the panel to consider in deciding whether the Canons have been violated.

CHAIRMAN JAMISON: I will overrule the objection. It will be admitted.

Nor, after reviewing Judge Proctor's motions to dismiss included in the record, of which there were several, does it appear that he ever sufficiently developed a due-process argument regarding the use of this report. Rather, he merely cited to the

United States and Arkansas Due Process Clauses. This court has held that to preserve an argument for review, it must first be raised and sufficiently developed below. *See, e.g.*, *Greenwood v. Anderson*, 2009 Ark. 360, ___ S.W.3d ___; *Stilley v. Supreme Court Comm. on Prof'l Conduct*, 370 Ark. 294, 259 S.W.3d 395 (2007). Accordingly, we are precluded from reaching the merits of Judge Proctor's due-process argument.

C. Failure to Comply with Rule 11F

Judge Proctor next asserts that the Commission violated Ark. Jud. Discipline & Disability Comm'n R. 11F (2007), which provides, in pertinent part:

> A factfinder other than the entire Commission shall, within sixty (60) days after the hearing, submit its findings and recommendation, together with the record and transcript of the proceedings, to the Commission for review and shall contemporaneously serve them upon the judge.

Judge Proctor contends that the Commission violated Rule 11F when its three-member panel, the factfinder, delivered its opinion to the Executive Director, who then delivered it to the

Commission, rather than the three-member panel delivering it itself. He asserts that this was an erroneous delegation of responsibilities in contravention of the rule and, therefore, this court should not entertain, much less follow, the Commission's recommendation of removal.

Again, it appears that Judge Proctor construes this rule as requiring strict compliance and as being jurisdictional in nature. However, there is no indication by the language used in the rule that would require this court to dismiss the charges against Judge Proctor or reject the Commission's recommendation of removal due to the Commission's failure to strictly comply with the rule. Moreover, we cannot say that the three-member panel did not comply with the rule, where it submitted its findings and recommendations to the Commission using, what was in essence a messenger, here, the Executive Director. Judge Proctor's argument lacks any merit.

D. Other Errors of Law

Judge Proctor asserts several errors under Ark. Code Ann. § 25-15-212(h)(4) of the Arkansas Administrative Procedure Act ("APA"). While this court has not previously addressed the APA's application in judicial-discipline matters, we have held that the Act is inapplicable in professional-

conduct matters, because that committee is an administrative agency of this court and the rules for such proceedings are promulgated by this court. *See, Wood v. Supreme Court Comm. on Prof'l Conduct*, 343 Ark. 696, 38 S.W.3d 310 (2001).

While we cannot say that the Judicial Discipline and Disability Commission is an administrative agency of this court, this court was directed to promulgate the procedural rules for the Commission, and it did so. *See* Act 637 of 1989, § 9; *In re Rules of Procedure of the Arkansas Judicial Discipline & Disability Comm'n*, 298 Ark. Appx. 654 (1989) (per curiam). *See also Griffen v. Arkansas Judicial Discipline & Disability Comm'n*, 368 Ark. 557, 565, 247 S.W.3d 816, 822 (2007) ("Judicial discipline and the procedures defining that process are clearly *sui generis* and unlike your typical administrative action that first must be reviewed in circuit court."). Accordingly, we hold that the APA is inapplicable to judicial discipline matters. Notwithstanding this holding, we will still address Judge Proctor's arguments, though not in the context of the APA.

1. Findings based on prior, dismissed allegations

Judge Proctor contends that the Commission's recommendation of removal is affected by error because it based its findings on conduct that had been the subject of prior, dismissed allegations

against him. Specifically, he cites to: (1) case 2004-282, which involved allegations by an anonymous individual regarding Judge Proctor's involvement with Mr. Davis and another probationer, Robert McGee, and which ended in dismissal on September 16, 2005;[16] (2) case 2005-265, which involved another anonymous 16 complaint by a probationer that probation money was being stolen and questioned the payments to Cycle Breakers, and which resulted in dismissal on September 16, 2005, due to insufficient cause to proceed; (3) case 2005-308, which involved a complaint by Shirley Sims involving Judge Proctor's involvement with her brother, a probationer, and another probationer, and which resulted in a dismissal on January 20, 2006, due to insufficient cause to proceed; and (4) case 2006-117, which involved an anonymous complaint by a concerned trial lawyer involving Judge Proctor's civil-probation program, and which was dismissed on September 15, 2006, due to insufficient cause to proceed. He argues that the current allegations are barred by res judicata because they were previously litigated and that it was entirely reasonable for him to assume that the

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[16] While this hearing was one in which the Commission was to determine whether to dismiss or proceed to a probable-cause hearing, the record reflects that Judge Proctor waived the preliminary hearing and asked that the hearing be one on probable cause.

Commission's prior dismissals were an indication that he was in compliance with the canons. Judge Proctor's contentions are without merit. While it does not appear that this court has previously determined whether res judicata is applicable in judicial-discipline proceedings, it is clear to this court that it is inapplicable in the instant case. Res judicata is comprised of two facets, claim preclusion and issue preclusion. *See Council of Co-Owners v. Glyneu, LLC*, 367 Ark. 397, 240 S.W.3d 600 (2006). Claim preclusion bars the relitigation of a subsequent suit when five elements are met. *See id.*

These include: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *See id.*

Collateral estoppel, or issue preclusion, bars the relitigation of issues that were actually litigated by the parties in a previous suit. *See id.* The issue must have been previously litigated and determined by a valid and final judgment, and the following four elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and final

judgment; and (4) the determination must have been essential to the judgment. *See id.* In addition, the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue. *See id.*

Neither claim preclusion nor issue preclusion applies to Judge Proctor's case. Here, none of the four prior cases cited by or relied upon by Judge Proctor proceeded to a formal disciplinary hearing. Instead, each was dismissed due to insufficient cause to proceed.

Indeed, three of the four never reached a probable-cause determination. Again, with respect to claim preclusion, the first suit must have resulted in a final judgment on the merits. None of the four prior cases against Judge Proctor resulted in a final disciplinary hearing with a final judgment on the merits. A dismissal based on insufficient cause to proceed in no way equates to a final judgment on the merits. Accordingly, claim preclusion is inapplicable.[17]

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[17] Nor is Judge Proctor's citation to *Bockman v. Arkansas* 17 *State Med. Bd.*, 229 Ark. 143, 313 S.W.2d 826 (1958), persuasive, as it is distinguishable from the instant case. In *Bockman*, an administrative appeal, a prior complaint had been filed with the state medical board that Dr. Bockman's license should be revoked on the ground that he had been convicted of crimes of moral turpitude. However, the Board declined to revoke his license, holding that the proof of

Nor does collateral estoppel, or issue preclusion, apply, as it requires the issue to have been actually litigated. Because all four prior cases against Judge Proctor were dismissed due to insufficient cause to proceed, none were actually litigated. In addition, we are not persuaded by Judge Proctor's assertion that he was entitled to believe that his actions were permissible due to the Commission's prior dismissals. While it dismissed the prior complaints due to insufficient cause to proceed, the Commission made no final, evidentiary finding regarding the propriety of Judge Proctor's actions. Accordingly, we hold that Judge Proctor's claims on these bases are without merit.

2. Discovery rulings

Judge Proctor further asserts that the Commission's recommendation of removal is

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identity was insufficient and that in any event the offenses did not involve moral turpitude. On certiorari, the circuit court did not disturb the Board's findings, and no appeal was taken to this court. This court held that that decision was correctly relied on as a complete bar to the pending proceeding, as the pending complaint alleged the same New York convictions. It is clear from *Bockman* that a final judgment on the merits was had by the state medical board in the prior proceeding. That is not the case here, where the prior complaints never proceeded to a formal disciplinary hearing on the merits of those complaints.
Accordingly, Judge Proctor's reliance on the *Bockman* case is misplaced.

tainted by the Commission's erroneous rulings on three discovery matters. Specifically, he contends that he was prejudiced by three violations of discovery by the Commission, alleging: (1) that the Commission failed to provide him access to the file in case 2005-265, which contained statements by Alice Abson regarding his alleged conduct and civil probation; (2) that he was never provided access to the case file in case 2005-308, which contained a notice recommending dismissal of that complaint due to Judge Proctor's agreement to change his procedures; and (3) that the Commission failed to produce certain documents relating to Tonia Goolsby and Bruce Engstrom. According to Ark. Jud. Discipline & Disability Comm'n R. 11B (2007), the judge and the Commission shall be entitled to discovery in accordance with the Arkansas Rules of Civil Procedure. Judge Proctor, while claiming he was prejudiced by the discovery violations, has failed to demonstrate to this court how his defense would have differed had he received the above referenced documents in a more timely fashion. Notwithstanding his failure to so demonstrate, we have been unable to find any prejudice to Judge Proctor relating to these discovery violations during our de novo review of the record before us. Because there is no basis for prejudice relating to these discovery matters, Judge Proctor's claims are without merit. *See, e.g.*, *Banks v. Jackson*, 312 Ark. 232, 848 S.W.2d 408 (1993).

3. Failure to recuse

Judge Proctor also asserts that the Commission's recommendation should not be followed because it is affected by "error or law" because Commission members failed to recuse. He avers that recusal was required when: (1) the Commission, after finding probable cause, erroneously allowed the Executive Director to prepare the findings and to sign them on behalf of the Commission's chairman, which he claims constituted an impermissible commingling of prosecutorial and adjudicatory functions; (2) the Commission failed to notify him of any open and public session in which it announced its final action, when he had specifically requested to be present at all hearings; (3) the Commission members that voted to approve an extraordinary filing with this court subsequently sat as adjudicators after that vote; and (4) Commission member Larkowski had cases pending before Judge Proctor at the time he sat as a member of the three-member panel and full Commission.

This court has held that, in cases where judges have been asked to disqualify, judges are presumed to be impartial, and the person seeking disqualification bears a substantial burden in proving otherwise. *See Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 16

S.W.3d 212 (2000). We have further held that the decision to recuse is within the trial judge's discretion, and it will not be reversed absent abuse. *See id.* Here, Judge Proctor has wholly failed to present this court with any evidence to show or prove bias on the part of any Commission member, nor has he demonstrated that any Commission member abused his or her discretion in failing to or deciding not to recuse. Further, the Commission's recommendation of removal in no way evidences proof of bias. Accordingly, Judge Proctor's arguments lack merit.

E. Violations of Constitutional Provisions

Judge Proctor next asserts that it was constitutionally impermissible for the Commission to allow the Executive Director to prepare and sign its findings of fact, and, further, that there was an impermissible commingling of investigatory and adjudicative responsibilities when the Commission authorized the Executive Director to file an extraordinary petition with this court. He then makes the bare allegation that the Commission violated his due-process rights.

This court has held that state judges have protected due-process rights, the basic components of which are fairness, meaningful notice of charges, and a meaningful opportunity to defend oneself. *See*

Judicial Discipline & Disability Comm'n v. Simes, 2009 Ark. 543, ___ S.W.3d ___. Here, Judge Proctor's argument is based solely on one citation to authority, *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234 (2003). There, the California Court of Appeal, Second District, Division 3, held that the petitioner's due-process rights were violated when the City's advocate for the initial denial of petitioner's renewal application acted as a legal advisor to the hearing officer reviewing that denial. The facts in that case are in no way similar to the facts before us here. The record reflects that the Executive Director signed, for Chairman Jamison, a letter to Judge Proctor certifying the allegations for which the Commission found probable cause to proceed.[18] Additionally, the record includes the sealed petition filed with this court on April 23, 2008.

Arkansas Judicial Discipline & Disability Commission Rule 9E(3) (2007) provides, in pertinent part, that [i]f [the Commission] finds, by concurrence of a majority of members present, that there is probable cause to believe that there has been misconduct of a nature requiring a formal disciplinary proceeding, the *director* shall cause the judge to be served with the report, the formal statement of charges, the record of the probable

[18] The signature reflected "Leon Jamison by DAS."

cause determination, and all documents upon which the determination was based.
(Emphasis added.)

If, according to the rule, the director shall cause service on the judge of the findings following probable cause and other items, we cannot say that it was in any way unfair, or otherwise violative of due process, for the Executive Director to sign the letter stating the findings on behalf of the chairman with his permission and to so indicate. Judge Proctor's argument on this issue fails.

With respect to the extraordinary petition filed with this court, we, again, see no due process violation. Rule 10A of the 2007 Rules of Procedure of the Arkansas Judicial Discipline & Disability Commission provides that [i]n instances of the (1) filing of an indictment or information charging a judge with a felony under state or federal law, or (2) the filing of a misdemeanor charge against a judge or justice where his ability to perform the duties of his office is adversely affected, the Commission shall convene within ten (10) days for the purpose of considering a recommendation to the Supreme Court that the judge or justice be temporarily suspended with pay pending the outcome of any disciplinary determination.

Rule 10B further provides that "[a] temporary suspension with pay as an interim sanction shall not preclude action by the Commission with respect to the conduct that was the basis for the felony or misdemeanor charge, nor shall the disposition of the charge in any manner preclude such action." Ark. Jud. Discipline & Disability Comm'n R. 10B (2007).

If the Commission may convene to make such a petition to this court in certain circumstances, we cannot say that the Commission's convening in the instant case was in any way a violation of due process. While there was no filing of any charges against Judge Proctor pursuant to the rule that precipitated the Commission's filing in Judge Proctor's case, the rules clearly contemplate the Executive Director filing pleadings with this court only after the Commission has convened and rendered a recommendation, even prior to any action by the Commission with respect to the conduct. Accordingly, Judge Proctor's argument on this issue, too, is without merit.

F. Prejudice of Substantial Rights

For his final procedural argument, Judge Proctor, relying on the APA, asserts that he has a substantial right to due process, which was prejudiced: (1) when he was required to defend

against a complaint about which he was never properly noticed and which was ultimately used as a primary basis for the recommendation of removal; (2) when he was denied the right to a prompt and speedy resolution of this matter; (3) by the procedures followed by the Commission that gave the Executive Director a distinct advantage; and (4) by the fact that the Commission made findings on the same allegations it had previously dismissed.

We cannot say that any of these issues raises due-process concerns. Again, as we have held in this case, the APA does not apply in judicial-discipline cases. But notwithstanding the inapplicability of the APA, we again note that state judges do have protected due-process rights, the basic components of which are fairness, meaningful notice of charges, and a meaningful opportunity to defend oneself. *See Simes, supra.*

That being said, each of Judge Proctor's arguments has been rejected for the previously stated reasons, and we cannot say, after examining the record before us, that Judge Proctor was in any way deprived of a fair hearing, meaningful notice, or a meaningful opportunity to defend in violation of his due-process rights. While the methods followed by the Commission may have sometimes deviated from the procedures set forth by this court, none of the Commission's departures from procedure

rendered Judge Proctor's hearing unfair so as to constitute a due-process violation. Accordingly, we reject Judge Proctor's arguments on this issue.

VI. Sanction

We must now determine the appropriate sanction and decide whether to accept the Commission's recommendation of Judge Proctor's removal. This court has recognized certain factors to be considered in determining the appropriate sanction for judicial misconduct, including: (1) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (2) the nature, extent, and frequency of occurrence of the acts of misconduct; (3) whether the conduct occurred in or out of the courtroom; (4) whether the misconduct occurred in the judge's official capacity or in his private life; (5) whether the judge has acknowledged or recognized that the acts occurred; (6) whether the judge has evidenced an effort to change or modify his conduct; (7) the length of time of service on the bench; (8) whether there have been prior complaints about this judge; (9) the effect the misconduct has upon the integrity of and respect for the judiciary; and (10) the extent to which the judge exploited his position to satisfy his personal desires. *See Thompson*, *supra*.

Here, the record clearly reflects that Judge Proctor's conduct was not an isolated instance, but

instead evidenced a pattern of conduct. Undoubtedly, Judge Proctor believes his actions were taken with a sincere desire for better, but we cannot ignore the repeated instances of his poor judgment. In addition, Judge Proctor's misconduct was of a grave nature, in that it clearly affected the public's perception of the judiciary's impartiality, and it occurred on a frequent, and often repeated, basis. His actions took place, as set out above in length, both in and out of the courtroom, and they occurred both in his official capacity and in his private life.

While Judge Proctor has fully admitted that the acts occurred, it does not appear that he has evidenced a steadfast effort to change or modify his conduct. Indeed, despite repeated investigations and Judge Proctor's protestations that he would change his behavior, he continued to utilize the Cycle Breakers program even though his involvement with the Cycle Breakers program was under scrutiny.

At the time of this writing, Judge Proctor will have served as circuit judge for nine years, as he took office on January 1, 2001. While there have been previous complaints against Judge Proctor, as outlined in this opinion, it appears that they were dismissed by the Commission, after Judge Proctor agreed to effect changes in his conduct. However, it

is evident to this court that Judge Proctor's misconduct has had an effect on the integrity of and respect for the judiciary. Finally, we must consider the extent to which Judge Proctor exploited his position to satisfy his personal desires. While some might consider Judge Proctor's motives admirable in that he only sought goals of rehabilitation, both the testimony before the Commission and Judge Proctor's actions themselves clearly demonstrate that he used his position as a judge to further his personal desires and goals.

On a final note, Judge Proctor has steadfastly maintained to this court that his intentions were nothing but true. While that may be, good or true intentions do not absolve a judge of his or her ethical duties under the canons. As the Preamble to our Code of Jud. Conduct provides:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. *Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system*. The judge is an arbiter of facts and law for

the resolution of disputes and a highly visible symbol of government under the rule of law.

Preamble, Ark. Code Jud. Conduct (emphasis added).

Arkansas Code Annotated §16-10-410(b)(5) (Supp. 2009) provides, in pertinent part, that "[a] judge may be removed from office . . . [for a w]illful violation of the Arkansas Code of Judicial Conduct[.]" Because we have accepted the foregoing findings of willful violations of the judicial canons, we hereby order Judge Proctor removed. Pursuant to Ark. Jud. Discipline & Disability Comm'n R. 12E, we direct that no motion for rehearing will be entertained and that this decision shall be final upon filing. Recommended findings accepted in part, modified in part, rejected in part; recommendation of removal accepted; removal ordered.

Special Justice TONYA ALEXANDER joins.

BROWN, J., and Special Justice PAUL KEITH concur.

WILLS and SHEFFIELD, JJ., not participating.

ROBERT L. BROWN, Justice, concurring.

I agree with the majority opinion but write separately to add some additional thoughts. As an initial matter, I too am concerned about the Commission's recurrent noncompliance with its own rules as expressed in the majority's footnote. Although this court has yet to find that the Commission's failure to comply with one of its procedural rules violates a judge's rights so as to require dismissal or other action, the noncompliance plainly undermines the confidence in the judicial-discipline process.

In this case, for example, Judge Proctor alleged that the Commission failed to follow three of its procedural rules: Rules 11A, 8D, and 11F. The majority finds, and I agree, that Judge Proctor failed to preserve his argument on Rule 8D. On the other hand, for Rules 11A and 11F, this court rejected Judge Proctor's argument that the Commission's procedural rules were jurisdictional in nature and thus required strict compliance. Judge Proctor, however, did not claim that the Commission's failure to comply with its procedural rules violated his due-process rights.

I note that a number of other courts have addressed the issue of noncompliance with procedural rules in judicial-discipline proceedings and concluded that dismissal is not warranted in the absence of a showing from the judge that the noncompliance

prejudiced that judge and denied him or her due process of law. *See, e.g.*, *McCartney v. Comm'n on Judicial Qualifications*, 526 P.2d 268 (Cal. 1974) ("relief from the deleterious effect, if any, of the Commission's failure to follow [its procedural rules] may be secured by petitioner only upon a showing of actual prejudice"; no such prejudice shown where judge received adequate notice of charges and reasonable time to prepare his defense) overruled on other grounds by *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209 (Cal. 1975); *In re Kirby*, 354 N.W.2d 410 (Minn. 1984) (the failure of the Board of Judicial Standards to give Judge an opportunity to respond to each allegation constituted a breach of its own procedural regulations but was not "so violative of due process as to raise the concern that fundamental fairness may not have attached"); *In re Storie*, 574 S.W.2d 369 (Mo. 1978) (judge could not be heard to complain of the Commission on Retirement, Removal and Discipline's irregular compliance with its informal notice rule, absent a showing of prejudice); *In re Hill*, 568 A.2d 361 (Vt. 1989) (judge could not show prejudice stemming from the Judicial Conduct Board's failure to comply with procedural rule requiring that the judge have an opportunity to respond during a preliminary investigation where the judge received full notice of the charges and an opportunity to respond).

I agree with this line of authority. The Commission's noncompliance with its own procedural rules should only entitle a judge to relief upon a showing of actual prejudice to the judge's due-process rights to meaningful notice and an opportunity to defend oneself. Notice and a hearing are rights specifically given to judges by Amendment 66(c) to the Arkansas Constitution. Upon a showing of actual prejudice, when those rights have been impaired, relief to the accused judge in some form should be afforded.

As a second point, Judge Proctor points to several actions of the Commission that he alleges evidence an impermissible commingling of investigative and adjudicatory functions by its members. I would simply note that this argument, without a further showing of the deleterious effect of combining the roles, has consistently been rejected in the context of judicial-discipline proceedings. *See, e.g., Kloepfer v. Comm'n on Judicial Performance*, 782 P.2d 239 (Cal. 1989); *In re Zoarski*, 632 A.2d 1114 (Conn. 1993); *Nicholson v. Judicial Retirement & Removal Comm'n*, 562 S.W.2d 306 (Ky. 1978); *Matter of Mikesell*, 243 N.W.2d 86 (Mich. 1976); *In re Elliston*, 789 S.W.2d 469 (Mo. 1990). In addition, the Supreme Court held in *Withrow v. Larkin*, 421 U.S. 35 (1975), that "the combination of investigative and adjudicative functions does not,

without more, constitute a due process violation" and gave the following illustrations:

> Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement

> proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law. We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around.

Id. at 57.

For this reason, I agree with the majority on this issue as well.

SPECIAL JUSTICE PAUL KEITH joins.

APPENDIX B

IN THE ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION FULL COMMISSION

No. 07-198; 07-199; 07-306; 07-362

IN RE: HONORABLE WILLARD PROCTOR, JR.,

Argued: April 27 – May 1, 2009
Opinion Delivered: June 26, 2009

Final Findings, Conclusions and Recommendations

Findings of Fact

Cycle Breakers, Inc

1.) Judge Proctor prepared a "profit & loss" statement for his Division and sent it to the bank for a determination of the credit worthiness of Cycle Breakers, Inc.

2.) Judge Proctor served as an officer, director, trustee or non-legal advisor of an organization that was to be engaged in proceedings that ordinarily came before the judge.

3.) Judge Proctor lent the prestige of his office to a private corporation by preparing a "profit & loss" statement for his Division and sending it to the bank for a determination of the credit worthiness of Cycle Breakers, Inc.

4.) Judge Proctor involved himself in the operation of Cycle Breakers, Inc. to the extent that it cast reasonable doubt on the judge's capacity to act impartially as a judge.

5.) Judge Proctor personally involved himself with party defendants in his Court to the extent that it cast reasonable doubt on the judge's capacity to act impartially as a judge.

Probationer Relationships

6.) Judge Proctor failed to avoid the appearance of impropriety by sending money to a convicted robber that he sentenced to the Department of Corrections.

7.) Judge Proctor allowed a party defendant in his Court to live at the Judge's personal residence for over a week.

8.) Judge Proctor allowed a party defendant in his Court to live at the Judge's personal residence on certain weekends.

9.) Judge Proctor gave rides in his personal vehicle to at least eight (8) party defendants.

10.) Judge Proctor had inappropriate contact with party defendants subject to his jurisdiction by collecting money from them in open court and eating lunch and visiting with them in chambers.

11.) Judge Proctor engaged in *ex parte* contact with party defendants subject to his jurisdiction by giving them car rides, by visiting with them at Cycle Breaker meetings, and by visiting with them in the courthouse outside of a court setting without counselor the State present.

12.) Judge Proctor stated that he knew he might lose his judicial office based on his actions regarding party defendants subject to his jurisdiction.

13.) Judge Proctor willfully allowed his personal interests regarding rehabilitating criminals to be superior to his sworn duty as a judge.

Treatment of Staff

14.) Judge Proctor coerced his staff into working for Cycle Breakers, Inc.

Respect and Comply with the Law

15.) Judge Proctor ignored and by-passed laws that were an impediment to his interest in Cycle Breakers, Inc.

16.) Judge Proctor enforced payment of "civil fees" from these defendants with the jail or with the threat of jail, knowing the money would go to his non-profit corporation.

Conclusions of Law

Cycle Breakers, Inc

1.) Judge Proctor willfully violated Canon 2 B by preparing a "profit & loss" statement for his Division and sending it to the bank for a determination of the credit worthiness of Cycle Breakers, Inc.

2.) Judge Proctor served as an officer, director, trustee or non-legal advisor of an organization that was be engaged in proceedings that ordinarily came before the judge in violation of Canon 4 C.

3.) Judge Proctor willfully violated Canon 4 C by lending the prestige of his office to a private corporation by preparing a "profit & loss" statement for his Division and sending it to the bank for a determination of the credit worthiness of Cycle Breakers, Inc.

4.) Judge Proctor willfully violated Canon 4 A ofthe Code by involving himself in the operation of Cycle Breakers, Inc. to the extent that it cast reasonable doubt on the judge's capacity to act impartially as a judge.

5.) Judge Proctor willfully violated Canon 4 A of the Code by personally involving himself with party defendants in his Court to the extent that it cast reasonable doubt on the judge's capacity to act impartially as a judge.

16.) Judge Proctor willfully violated Canon 2 A of the Code by failing to respect and comply with the law by enforcing payment of "civil fees" from these defendants with the jailor with the threat of jail, knowing the money would go to his non-profit corporation.

Opinion as to discipline

Given all of that which is before the full commission, it is our belief that there is clear and convincing evidence and proof, and there are, as well, compelling reasons for Judge Proctor to be removed from the bench.

Motions Filed May 22.2009. by Judge Proctor

The motions should be denied.

s./

Honorable Leon Jamison
Chairman

APPENDIX C

IN THE ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION THREE-MEMBER PANEL

No. 07-198; 07-199; 07-306; 07-362

IN RE: HONORABLE WILLARD PROCTOR, JR.,

Argued: April 27 – May 1, 2009
Opinion Delivered: June 1, 2009

Findings, Conclusions and Recommendations

2001-306, and 2001-362.

There remains an issue as to whether Judge Proctor was ever properly served in 2007- 306. The thrust of the 2007-306 matter lies in the Legislative Audi report and the testimony of one of its certified public accountants Kim Williams, It is our impression that the full panel had voted in October 2008 not to proceed to hearing on the Legislative Audit matter. In the event that the full panel did so, the evidence and the testimony presented can and would be useful even if only to shed light on other matters before the three-member panel.

The panel received numerous exhibits into evidence and heard from fifteen witnesses, ten from the Petitioner, The Judicial Discipline and Disability Commission (hereinafter "the staff") and five from the Respondent, Judge Willard Proctor, Jr. (hereinafter, and respectfully, "Proctor"). A summary of, and comment on, key portions of each person's testimony should be helpful to the entire panel in understanding our recommendation.

Captain Richard D. Day:

The first witness called by the staff was Captain Richard Day. Captain Day has worked for Proctor for six years, having previously worked for thirty years at the Pulaski County Sheriffs Office, Prior to that, he had a background in the military, having

served his country for four years in the United States Marine Corps, with some duty in Vietnam. Captain Day began his employment with Proctor as chief probation officer. He testified that he was a direct supervisor for Alice Absen, a lady hired by Proctor who ran a program name "Cycle Breakers" (hereinafter "CB"), CB fell under the umbrella of probation, but Day had the title but no authority over the program.

Judge Proctor told him that the purpose of CB was "to help folks" (on probation in Proctor's court). Day's role was modified later by Proctor; he was put in charge of courtroom security. He was told to be at "Saturday meetings, night meetings and banquets". Day told us that 5th division staff members were required to attend these meetings. The meetings initially hosted 120-150 people on probation. The meetings consisted of lectures, classes, and programs. All participants were required to attend quarterly mandatory meetings; there were some weekly meetings too.

Day testified that Proctor began "Show Cause Day". Probationers were required to attend and show cause why they may not have been in compliance with probation orders. Fees were collected at show cause meetings; some folks were jailed for non-compliance. The meetings were held ill the hallway initially as well as in the probation office Later

they were moved to probation offices only, As for who ran CB, Day testified that it was Proctor. He engaged the staff in conferencing, telling them in staff meetings what to do, and giving directions.

There was a financial function of CB meetings. Staff collected money, fees, missed-meeting fees ($100), as well as drug fees ($15). Proctor was consulting, talking with probationers, holding class, teaching bible study (in both the courthouse and the 5t Division courtroom), and hosting conferences related to jobs, health, etc.

CB work was done in 5th Division every day, by all staff. Fifth division equipment was used, the copier, machines, computers, etc. Day was told to be there by Proctor or "be fired". The money received for overtime by the county was fair; the money for work for CB wasn't enough. Some weekend meetings lasted 8-10 hours. Law clerks (as a rule, licensed attorneys) would work the meetings as welt they "would teach groups."

As for the finances of CB, Day testified that Proctor installed a computer program called "Quickbooks", and had access to them in his office. Day also saw e judge interview and take money from probationers, he saw the judge's desk filled with checks and cash money, and be once saw the judge put (cash) money in a bag and walk towards the bank. Proctor had

the main checkbook for CB in his office. The checks were signed by other people, Proctor asked Alice Absen to sign checks for him for to reimburse him for court things, Day recalled telling the judge once that he thought it looked bad for the judge to take money fro probationers. He could not recall the judge's reaction. Furthermore, CB money was used to feed jurors and to feed participants at meetings. "Judge Proctor authorized all of this," he aid. Proctor also set financial goals for CB and once believed it could collect $250,000.00 in the ext year.

Day testified that technology in Fifth Division was "state a the art". Day set it up and ran it, e.g. DVD's, VHS tapes, monitors, and computers. He recommended to Proctor to buy some of it; some was purchased through the comity's budget process, some through private donations, and some with money collected by CB. Day testified that "Judge Proctor authorized everything."

There was a time in 2004-05 when probationers worked in the fifth division office. They "had access to everything, even while we were in court," sitting at desks, interacting with Proctor, eating lunch with him, helping to move stuff, etc.

Day testified that CB tried to buy a building at 9th and Apperson. Proctor took his staff there and showed them the renovations he envisioned, the

offices, and how a "chem-free house" (a residential facility for addicts designed to be supervised to insure that addicts are in a place free from temptation to use and abuse chemicals for which they could develop or have developed a dependency) could exist there. "

Sally Porter

The next witness for the staff was Sally Porter. Ms. Porter worked for Proctor from 2001-04, and for Southwestern Bell prior to that for 30 years. She took a leave of absence to go to work for the opening of the Clinton library. She did not return to work for Proctor; she was under the belief that Proctor "hated me when [she] left" in December 2004.

Porter's testimony then corroborated much of what Captain Day described about CB functions and finances, as well as probationers lingering in the fifth division offices. She added that Proctor was Deacon at Abundant Life Church, and that he was in charge of finances there.

Ms. Porter described a relationship Proctor had with a probationer named Demoreo Davis. Davis and other probationers had the judge's direct office number, Proctor took them to church, and Demoreo lived with Proctor. Ms. Porter also describe

installing a "listening device" in Proctor's home so that he could "bug" the phone conversations his "little brother" (as set forth in the Big Brothers/ Big Sisters program), Keedron Mitchell, and his girlfriend had. She related that Proctor was irate about one conversation, and called the girlfriend a "whore, bitch".

Kenny Haskins

Kenny Haskins was the chief probation officer for Fifth Division. He worked the CB program, on a voluntary-basis at first, teaching anger management lasses. Haskins witnessed Demoreo Davis live in the CB "chem-free" house, felt Davis had a severe cocaine problem, and saw Davis at Proctor's house. Haskins testified that on one occasion Proctor called Haskins and told Haskins to come get Davis, that Davis had gone on a cocaine binge, and that Haskins responded and took Davis to jail. He admitted on cross examination that in a letter dated September 7, 2004, he did not mention that he saw Proctor give Davis a ride.

Haskins related how Proctor and he rode around "looking for property" (for CB). They eventually looked at property at s" and Apperson, a property upon which CB would eventually make an offer to purchase. The real estate agent involved was Tina Ward. Haskins signed one of the documents for CB

because Proctor said he could not because h was a judge. A second document (perhaps the offer and acceptance) was signed for Haskins by Proctor with Haskins' consent.

Haskins offered an explanation as to how money began to be collected by Fifth Division staff after the treasurer's office no longer could. He then explained how eventually it was later collected by the circuit clerk's office.

It is worth noting that Haskins "never heard any" threats made by Proctor to his staff. He also did not ever see Proctor cuss. He admitted that Proctor would get upset with staff; he stated that "if [Proctor] was upset with m· he would not talk to me." Haskins "did not see anything out of line." He went to most staff meetings.

It is also worth noting that Haskins said that Proctor sent out a memo on August 31, 2004, in which he encouraged his staff to cooperate with the Demoreo Davis investigation.

Haskins testified that probationers were on the board of directors for CB, but he was not sure who or how many.

Zane Chrisman

Ms. Chrisman is an attorney with the Arkansas Insurance Department; she worked as Proctor's law clerk from May 2004 through July 2006. She believes that she left on good terms with Proctor.

Chrisman testified that Proctor admitted to her that he would "sit on Demoreo Davis" over the weekend to keep him (Davis) from getting high. She said Proctor admitted that he had to stop doing this because exposure of this fact "might [cause him to] lose his judgeship". According to Chrisman, Proctor said he was "called by God to do is"; that he "had a dream [to} go out and create this [program, CB,] to rehabilitate them."

Chrisman testified to an anger management technique Proctor used. He would put the name of a person he was mad at on a piece of sticky paper and place it on the bottom of his shoe. He would then proceed to stomp his foot. She also stated that he would threaten to fire people on a daily basis. She told him that this was causing low office morale He thanked her, told her it would stop, but then he started back up again.

Chrisman testified that Proctor needed signed blank checks She cited an example of one time he "had me sign a check for Kristen Brimley," Also she said Proctor would make out bank deposit slips,

and then had others make those deposits, including probationers,

One of her main job responsibilities was the preparation of orders, including orders to seal (which would expunge a criminal record). In one case, she recalled that the subject matter was a sex offense (one not normally able to be expunged). She said he was inclined to do *it*, but that she "would not [assist to] expunge it," She asked him to do it.

LaShannon Robinson

Ms. Robinson is the current civil case coordinator; she replaced Sally Porter in 2005. Ms. Robinson believes she had good relationship with the judge until he "told me that I was beginning to act like Sally."

She related that he had threatened people with firing, that he threatened her during state audit, and that he told her not to talk about things to auditors. According to Robinson, Proctor was upset about the ["Arkansas] Times" article. Furthermore, he called Neva Warford, the judge's court reporter and complainant in one of the four cases her in, a "ho", the writers for the "Times" a "bunch of crackers", and Tonia Goolsby a "witch; she's on my list".

Robinson testified that Proctor represented her while in private practice before he took the bench on a "PI case" (i.e, "personal injury" car accident) in 1994-95. On June 9, 1995, a settlement was reached, and checks were cut. On August 14, 2007, she opened mail and saw a trust account balance that she learned included money owed on her case. Proctor said he did not owe her any money. She confronted him later about it with old documents. He said he "would ask Badami and Mark Leverett". (Badami was the executive director of this Commission at the time; Mark Leverett was an attorney who took over Proctor's trust account when Proctor took the bench.) A few months later, he called her into his office to discuss this matter, said "let's wheel and deal." He wrote her a check to finally settle the entire matter,

Tonia Goolsby

Ms. Goolsby testified that she was the division chief for the prosecuting attorney's office in 5th division from January 2006 until September 2006. Her testimony revealed that Hugh Finkelstein was the division chief prior to her from January 2001 onward, and that Rob Berry was the division chief who followed her. The thrust of her testimony was in the nature of complaining how some probation revocations would last for months, and some for years. She complained that she "could not get a

revo hearing," and that "only hen he [Proctor] was upset with a defendant would we get one."

Ms. Goolsby witnessed Proctor collect money from clients n the record, hand the money over to a court member (employee), which was then placed near judge. Also she saw him collect money once at a show cause event. She saw probationers in his office, carrying boxes, doing clerical things, e.g. copying, stapling, stuffing jury mail outs, etc.

She testified that she had a problem with "civil probation" which the judge would terminate probation early and expunge a probationer's record, but aid person would still owe and report to a probation officer. She also complained about cases being "sealed" [criminal record expunged] without her knowledge; frequently she would find out about the sealing after the fact. In one sample case, one certain Rebecca Coleman, the docket sheets memorialized that Coleman "plead nolo" *("'nolo contendere",* Latin for "no contest", which basically means one is not admitting guilt but does not wish to fight the charges). A petition to seal was filed, the state objected, and on August 25, 2005, an order to seal was entered. Ms. Goolsby showed how payments were made on this case after that date.

She also testified that some probationers were jailed and he d sometimes for fifteen days without a

remedy for unpaid fees, fees which would be paid to CB Inc.

It should be noted that Ms. Goolsby testified that Proctor was "very professional with attorneys and others".

She testified that she believed that Hugh Finkelstein was unhappy with the way sentences were held over a defendant's head. She admitted that despite her frustration, and apparently other prosecutors' office members' frustration with Proctor's tactics on' revo" hearings and petitions and orders to seal, her office did not appeal these cases, nor did they petition the Supreme Court of Arkansas for a writ of mandamus or writ of prohibition, nor engage in any other type of affirmative relief in an effort to stop Proctor from doing these things.

Kim Williams

Ms. Williams is a certified fraud investigator for the Arkansas Division of Legislative Audit. She has been a CPA since 1984. She stated that State Representative Sandra Prater requested Proctor's court be audited in December 2006, with an emphasis on CB. In January 2007, she conducted an entrance conference with Proctor and his staff. Legislative Audit wrote a report and finished it in

the summer of 2007 As part of their task they requested from Proctor CB minutes, bank statements, general ledgers, contracts, credit car statements, W-2's, and quorum court minutes.

Chronologically she testified right before Bruce Engstrom, but after going back and reviewing all the evidence, the great value in her testimony is in h ability to support, or corroborate, some of Engstrom's testimony. (It is worth noting Respondent did not offer any expert testimony to challenge either witnesses' findings.) Specifically she found, like Engstrom, that CB, Inc., the judge, his employees, and the court had no arms- length separation in the transactions by and between CB, Inc. and 5th Division Circuit Court.

Ms. Williams offered her belief that the Arkansas state constitution prohibits a county from giving money to a non-profit unless the non-profit is engage in some activity that it docs not. She also offered that her legal research found no civil probation the Arkansas statutes, and thus found it irregular that fees were charged to those off probation.

If the full panel deems the legislative audit report to remains a viable consideration in this matter, then it is worth noting that Ms. Williams found

undocumented reimbursements to Proctor in the amount of $3,863.29 during 2006.

Bruce Engstrom

Mr. Engstrom is a CPA. He graduated from the University in 1970, was licensed in 1972, and is engaged in financial analysis, certified in forensic work. By way of example his firm does contract work for the United States Department of Justice for Medicaid fraud. He charges $295 an hour personally, while others in his firm's bill at $100.00 +/hr. His bill thus far to the staff is around $50,000.00. .

After complete analysis of CB financial records Mr. Engstrom found that it is hard to draw a distinction between the judge (Proctor) and Cycle Breakers Inc., (hereinafter CB, Inc.), He acknowledged that CB, Inc., like most non-profit boards, appoints its officers, who then carry out business. However, in light of the development in accounting law and practices after the Enron case, it is extremely important to focus on corporate control. There are significant income tax consequences if control of a corporation is identified with another person or entity. He referred to this as the "assignment of income doctrine", or said another way, the "doctrine of domination and control" and cited tax court cases in Texas and

Florida. Engstrom explained that forensic accountants apply an economic test under "FIN 46", an accounting interpretation set forth by the Financial Accounting Standards Board, which basically examines "dominion and control" and determines who stands to gain or lose the most from corporate policies. Said another way, where does the risk lie, and who controls the risk? He explained that Enron's activity was hidden in other entities. The risk was borne by Enron but not reflected by Enron in its financial statements, and therefore their stock prices. It is now better accounting practice to look for things that others control, identify them, and properly account for them.

Engstrom's opinion was shaped by his finding that Proctor controls 100% of CB revenues and controls all disbursements. His analysis "'all had to do with the blank checks." By controlling the income and the expenses, the corporate structure known as Cycle Breakers amounted to a "fiction". The judge knew what money collected was going to fund, he did not lose control of the money, and there was a considerable amount of lack of internal control.
He analyzed the checkbook register from January 2003 until 2005. Some examples were January 3, 2005, a check to a "chem free house expense", another 'as one for an "appliance furniture", and the check was made out to Proctor. # 1453 was mad

out for 2 computers for courtroom, which Engstrom opined kept Proctor from asking permission from the Quorum Court or using other proper channels.

Engstrom was troubled by many expenditures, but named s me of these as examples: a check for accu-check meters, needles, cholesterol checks, A check dated 5.15.06 made out to Proctor for reimbursement for power supply and office supplies, check #2352 for cabinets, plumbing (but Engstrom was not sure where), a reimbursement to staff on July 1,2005; one to Lashannon Robinson for food and refreshments (McDonalds), a re-imbursernent to Hugh Finklestein, a check to Paul Worthy on May 6 for "one mower, on chain saw," etc., a check to Kenny Haskin, another for $2,070 for training at Webster University; more food from KFC and Sams, another for a gift for Hugh Finkelstein. The checks in even aunts are red flags and seemed to bother Engstrom.

According to Engstrom, the restitution fund had its own problems. The books showed money going in, but no payments going out to a victim, or money going to a victim but no money coming in from a correlated defendant: In short he believed there to be "very poor internal control."

Engstrom referred to the CB real estate contract.

In his opinion, the signatures of one person did not appear on both sets of documents. Tina Ward was listed elsewhere as a "key employee," but was also the real estate agent in the transaction. A commission check was made out to her, which, in his words, amounts to a "big no-no" for non- 0615 under Arkansas law and 501 (c)(3) regulations inasmuch as it tends to amount to self dealing . He went on to state that despite CB, Inc.'s recent approval as a 501 (c)(3) by the IRS. due to the variation in CB, Inc.'s projections and actual activity, he "had serious doubts" they would continue to enjoy non-profit status by the IRS. In one year CB. Inc. received only $700 came from a private contribution; the rest came from assessed fees. Furthermore expenditures of a non-profit cannot inure to benefit to one individual. One check was made out to an individual for equipment and computers.

Engstrom also had problems with a gift being made by a non-profit to Hugh Finkelstein, an attorney who had practiced as a deputy prosecutor in Proctor's court.

The bottom line of Engstrom's opinion came from Proctor telling defendants how much they owe to CB, Inc., and then he controls the expenses. This makes CB, Inc., in his professional accounting opinion, Proctor's "alter ego."

Alice Absen

Alice Absen was hired to run CB after an interview with a panel of individuals. According to Ms. Absen, initially CB was to have 105, first-time, non violent offenders, then eventually all probationers in Fifth Division were added. She describes her relationship with Proctor to be a good relationship at first, but then it "went south" after a complaint was filed [against Proctor). Spending became a problem; arguments ensued over what CB could spend money on. Absen said that Proctor "took over."

At CB meetings, Proctor would conduct and run the meetings; he would also collect the money. CB was incorporated by a paralegal at the law firm, Mitchell Williams. Proctor was in charge of the minutes. He kept them on a computer. He had a program for the books for CB on his computer. He printed checks from his office. Originally, Sally Porter and Absen had signing authority. They would sign them, and then they were locked in a safe so Proctor would have them ready for use.

With the money, Proctor bought electronic equipment, gift) food, and had meetings in Barton Coliseum, Brandon House, and other places. All probation officers did CB work. Intensive

probationers would hang around the office, eat lunch, make deposits, work on computers, etc. Proctor even took them to church.

Absen corroborated the Demoreo Davis accounts. He was an intensive probationer who eventually went to ADC (Arkansas Department of Corrections). Proctor sent him "postal money orders that were kept in Kenny's desk."

At times Proctor told Absen he hated her; he would call her "devil", alone and in front of other people. While at the retreat in Dallas, he said he could "get so mad be could kill us [5th Division staff]." He threatened to fire her in front of LaShannon Robinson and Dan Hancock. He called everyone "devil". He once said when he realized that there were 12 of us (on his staff), "You are my disciples, and I am God".

Willard Proctor. Jr.

Judge Proctor was called by the staff as its last witness. He admitted that to the outside public, CB and CB, Inc. "looked a lot alike". He admitted that one intensive probationer had his cell phone number and would call him on his direct office line. He admitted that he gave rides in his car to Demoreo Davis, Willie Coleman. and Ernest

McCuen. He admitted that Ms. Brimley (from his staff) hosted a "night-out function" for them at his house He acknowledged that he stopped by the "chem-free house and visited with them". He denied that he would take them to church, but some of them came to his church. He did not recall that he baptized one of them. He recalled that he was there but not "participating"; in other words, h "did not do the dunking."

Judge Proctor acknowledged that he took money from probationers at some show cause events. He agreed that he went to a CB health fair, job fair, etc. and had contact with probationers while there. He did state that he would direct staff to "sit on" an intensive probationer for a weekend. He was listed on the tax returns of CB, Inc. as an officer. "That was a mistake; I would have changed them (the returns)." He agreed that he was present at more than 85% of monthly meetings; CB, Inc. meetings were indeed conduct d in his courtroom.

As for civil probation, he stated that he created it, and it evolved over time. He would seal a record but then keep folks on civil probation. He did this for 29 people. It was based on a program in federal court in Iowa that gave him precedent. He state that civil probation was done with the consent of prosecutors in his court. He acknowledged that he sealed some violent offenses in error, that he signed

whatever his law clerk brought him. Some orders were so standard, that "I just signed them. I delegated routine ones to my law clerk." He added that some defendants went straight to civil probation with the consent of the state (prosecutor's office).

Judge Proctor wanted CB out of the courthouse building. He pushed for CB's own building, with the idea that it would be owned by Pulaski County, or the benefit of CB. He described how certain CB board members were all probation in his court. If they were ever revoked, they would be off the board. Judge Proctor frankly and quickly admitted to the Demoreo Davis controversy. He stated that Davis was convicted of robbery and theft, was classified as an intensive probationer, and he considered him a friend. He gave Davis rides, Davis stayed at horn with Proctor twice one month, and he once stayed with Proctor for a week. Proctor bought Davis some clothes. He sent Davis to the ADC upon revocation; this was done at a time after Davis lived with Proctor.

Proctor sent Davis money at the ADC for him to spend, in the following increments ... $50, 75,75,50,50, 75, 75, for a total of$450.00. All payments were conducted online by credit card. Proctor decided that this was not inappropriate because he knew if Davis' probation would ever be

revoked that Proctor had made up his mind that Davis' sentence was going to be ten (10) years in the ADC. If Davis ever re-appeared before him he would. recuse. And as for sending the money to Davis, only people at the ADC would know the money came from him. Proctor also acknowledged that at the JDDC Commission hearing in September 2005, he admitted to plenty of the Demoreo Davis controversy, but he did not volunteer all of the details at the time.

Proctor described the LaShannon Robinson matter. The remainder of the settlement money from 1995 was left in his trust account due to a lien from Dr. Dodson. Dodson had sued Allstate, and the matter had not finished by the time he took the bench. He wrote a letter "to cover my rear," and it remains there, apparently unclaimed.

If he called Tonia Goolsby a "devil", he did so "under my breath." He did not think "anyone heard me."

The Respondent then presented its case and called the following witnesses:

Agather McKeel

Ms. McKeel is an attorney in private practice, and represents CB, Inc. CB's previous attorney, Mark

Leverett (currently elected as district judge in Little Rock), was making his transition, so she offered to take over. She states that CB, Inc. has Ward's home at 2424 Gaines. Some records are kept there, and some are kept at her office. The bylaws say CB, Inc. should meet monthly; they meet on the third Tuesday. She explained that the IRS conducted an audit of CB, Inc. They once spent a Tuesday through a Friday at her offices to perform the audit. McKeel submitted an invoice and received a W-2 for $2500.00.

Ms. McKeel acknowledged that CB has a restitution account. It has an expense [which may have caused problems with the balance in the account], and some victims checks are returned as "mail undeliverable". One example of this was "Mike' Cork and Bottle' March 7, 2007. It had the defendant's name on it and is made out for $80.00. Another one was returned to the probation department from November 2006, a check to Crystal Jones in the amount of $37.10.

She testified that Judge Proctor has a reputation for "character for truthfulness, and it is a good one."

Joan Adcock

Joan Adcock is an elected city director in Little Rock. She helps run the Hope Center, a non-profit that originally promoted "welfare to work", a program created in the 1990's. When that program stopped, the Hope Center engaged in other work for the non-profits.

She described that when Proctor appeared at a city board discussion about sex offenders and violent people at meetings some parents were concerned about the proximity of public school. An amendment was made for none of those type of building at 9th and Apperson at all. While that seemed to satisfy some of the city board members, the next week one of the city board members changed his/her mind. Ms. Adcock stated at that point, she started getting involved.

She described how Little Rock School District, Hope Cent r, CB, and 5th Division entered a partnership to apply for a grant. She intimated that this showed a wide level of support for CB and what it was doing. Folks working in Little Rock's Adult Education program and all participants in CB were given Ms. Adcock's phone number to call her if they needed a job. She wanted all of them to have help in making a resume at the LR Workforce Center. She would help any of them find a home.

Ms. Adcock testified that she went to CB meetings and often called meetings to order. She dictated a change of classes, she would read the creed, and she made sure participants would dress respectfully (e.g. no hats).

Karla Burnett

Ms. Burnett is the county attorney for Pulaski County. She is present at most Quorum Court meetings. She was informed by Proctor of CB, Inc.'s intention to buy a building.

Ms. Burnett confirmed that Proctor emailed her and Ron Quillen (former Pulaski County comptroller) to discuss CB donating the Apperson building to Pulaski County. She advised that it would be possible, subject to the approval of county judge, after considering the cost of utilities, maintenance, and other costs.

Steve Sipes

Steve Sipes is an attorney who works as a supervisor in the Pulaski County Clerk's office. He testified to his knowledge regarding collection of CB fees. He stated that the treasurer used to collect "in house" probation fees, but that ended when the Treasurer's office began to use new software. The new accounting software did not have declining

value ability. Judge Proctor on his own developed a separate accounting program that could mimic what the treasurer's office used to do. He stated that they began to do it for 1sr Division Circuit Court too, and to his knowledge, it worked. He acknowledged that at one point it was a reed among county officials that one-half of CB fees would go to the county, and one-half to CB.

Janelle Honorable

Ms. Honorable is a probation officer in Judge Proctor's court and has been since January 2006. She has known Proctor for 20 years. They attend Abundant Grace Church together. She has been reprimanded by him once for leaving a weapon in her of comptroller for CB, Inc.

She has never known Proctor to use profanity at a staff meeting. She attended the staff meeting in Dallas; Proctor said nothing inappropriate. She denies that he said he would get so mad he could kill staff. Ms. Honorable does not recall any threats of firing, and does not recall him saying he hated Alice Absen. In fact Honorable said Proctor asked them to work better together.

She stated that the restitution account is now in clerk's office, but CB had it before then. Restitution money came first. She said that their office would

have told prosecutors about victim letters and money coming back mail undeliverable. Ms. Honorable said the prosecutors' office "said they would put investigator on it [to find better addresses] get back to us; they never did so.

Willard Proctor

Judge Proctor took the stand again in his own defense. He stated that he was a former head of Inns of Court (a private club of attorneys), a bar examiner, and a member of the Harold Flowers Society. He worked on the jury improvement system. The judge told us he became a judge to make some changes, especially in courtroom technology. He wanted all people in the courtroom to have computers, internet, Wolf Vision "Elmo", DV access, CDs, videotapes, cassette tapes, etc.
He acknowledged in the process of all of that which is before the commission, he "took some risk." He admitted that cash was seen on his desk. He verified that the clerk's office is now the only entity to collect fees for court, including CB fees. Debra Buckner (Pulaski County's treasurer) could not do it [collect court monies] anymore; Steve Sipes told him no declining balance function was available anymore, Proctor staled that he wanted to centralize the payment of money and in a better way, so he began to collect it

He admitted there were problems with Alice Absen. There were disagreements as to how to handle and pay for drug treatment, and he stated she could be co d and distant with people.

Judge Proctor vehemently denied ever referring to himself as "God". He characterized that as "blasphemy" and that he would never do that. He acknowledged again that he would have called folks a "devil under [his] breath." He would get mad at staff and he became «frustrated with their cliques."

He denies the wiretapping phones on Keedron Mitchell; he averred that Sally Porter's description of the house setup was fictional and therefore not believable.

The judge re-explained his situation with LaShannon Robinson and the funds from her case in the IOLTA account. The balance was $ 5551.44 in January 2001, when he took the bench and that balance remained the balance for years. He then explained much of what was handled in his previous testimony during the staff's case in chief.

Finally, Proctor explained that CB has evolved, and that "ware resolving most of what [the subjects of the complaints are about]." His court no longer orders money to be paid to CB, Inc.

Analysis of testimony and evidence

The appropriate standard of proof in this matter is clear and convincing evidence. We will show that the staff has met its burden on some allegations but as not on others.

We found Captain Day to be credible. He related that Alice Absen was in a position under him, but the point that he had no supervisory authority over CB seemed odd. It was clear from his testimony that Proctor controlled much of what CB was doing, that it was clear Proctor had high standards for those who worked for him, and that at most times he expected way too much from his staff. Proctor was aware that folks were watching him handle money; this shows the judge should have had concern for the appearance of impropriety. Day's assessment as to who was in charge of CB is worth noting, given his experience as Captain and his service in the military.

Ms. Porter corroborated Day's testimony relative to Proctor's control of CB. She described his relationship with Demoreo Davis in detail, something Proctor admits. It remains of interest why she and other staff members knowing of this during the 2004-05 investigation, held this back. Of even more interest is the withholding of the

wiretap information at that time as well. From a quick analysis of the relevant dates, we suspect she remained in criminal jeopardy then but with the passing of statutes of limitations, she does not. Proctor was able to offer something on this matter challenging this. Furthermore, there is no other, external evidence that this occurred. Accordingly, we find that the staff has failed to meet its burden of proof on the wiretapping matter.

Kenny Haskins verified Proctor's overwhelming control of CB. It is noteworthy that he never heard Proctor cuss. Haskins was involved deeply with CB, but did not know the makeup of the Board of Directors.

Ms. Chrisman offered credible testimony against Proctor. Her account of Proctor realizing he could lose his judgeship is significant as to Proctor's awareness of the risky behavior in which he was engaged. She corroborated the practice of the endorsement of blank checks.

Lashannon Robinson's testimony was credible and had value relative to the threats of firing by Proctor and the name-calling. We have considered all oft e testimony and evidence with respect to the amount of money from her settlement that remains in trust for the doctor lien.

We are not convinced that the staff has met its burden of proof and therefore do not find a violation of the judicial canons on this point. Whether it is actionable at the professional conduct committee, or whether the money belongs to Ms. Robinson, the doctor, or another is not our task and is left for another body to decide at another time.

Ms. Goolsby offered credible accounts of cases that were handled during the eight months she was in Proctor's court. We find that the way some of the cases were handled by Proctor was highly unusual, and must have certainly been frustrating to the State. It is significant that her office did not appeal any of these rulings nor did it challenge e Proctor by way of mandamus or prohibition to the Arkansas Supreme Court. We are not convinced that enforcement of unpaid monies beyond termination of probation is 'illegal and therefore actionable. See Basura v. City of Springdale, 47 Ark 66 884 .W.2d 629 1994. This may not apply to probation fees; it is questionable how some defendants were jailed for non-payment of fees that were to be paid to CB, Inc. By the same token we did t hear one example of a defendant appealing this issue either. It is also worth noting that Ms. Goolsby was assigned to Proctor's court for only eight months of the past eight years of Proctor's tenure on the bench. We heard no complaints from others within her office.

Considering on of the other prosecutors in her office was reimbursed for supplies for a CB function and also accepted a gift from CB, Inc., both with CB money, and, it appears, at a minimum, condoned some of the sentences by Proctor, it is possible that the dissent within Ms. Goolsby's office may have not been united. We find that the staff has failed to meet its burden of proof on the issues of civil probation" and extraordinary expungement practices.

Ms. Williams, as a CPA for Legislative Audit, gave helpful testimony that supported some of the findings by the witness who followed her, Bruce Engstrom, specifically that there was no arms-length transactions between CB, Inc. and Proctor's 5 Division Court. Ms. Williams cited also some research of the Arkansas Constitution of 1874 and opined that a county cannot pay a private corporation except for matters a county cannot perform on its own. Courts do regularly require litigants and parties before it to enter and complete programs conducted by non-profits (e.g., Family Service Agency) that bear a cost. We do not see the applicability of that constitutional provision here. If there is any issue, it remains with e fees or portions of fees directed to CB, Inc. that would amount to self-dealing.

It is also worth noting that Ms. Williams' finding that Proctor received undocumented reimbursements in the amount of [$3,863.29 for calendar year 2006.

Bruce Engstrom's testimony was very helpful in understanding the financial inner workings of CB and how an analysis of the same would support the bulk of the testimony, i,e. that Judge Proctor exhibited most of the control of CB, Inc. We accept the logic that when one controls the receipts for an entity and the disbursements as well, the entity is bound by the decisions of that one individual or entity controlling the flow offices. We also accept that CB, Inc. can then be construed to be the "alter ego" of the one who controls it. In this case that would be Judge Proctor. If we understand Engstrom's testimony, it is possible Proctor may endure tax consequences for the finances of CB, Inc. That may be factor to be considered in deciding the disposition in this matter.

Alice Absen verified the amount of control Proctor had over CB, as well as the Demoreo Davis matter, and the lingering of intensive probationers in the court offices. Her descriptions of Proctor's name-calling and threats to fire seemed credible. As for the comment of Proctor comparing himself to God, it is equally disputed by Proctor. It doe not appear that if it did occur that anyone else would have

heard it. We find that the staff did not meet its burden of proof on that comment by clear and convincirg evidence.

It was clear from the testimony of several witnesses that finances and documentation necessary for CB, Inc. to function was, at times, sloppy, incomplete, and some would say "half baked". Ms. McKeel's testimony suggests that there is currently m re attention paid to detail than was before her involvement. She offered some explanation for problems with the restitution account that CB maintained. We do not recall any examples of misapplied restitution that deprived anyone certain victim. Accordingly, we find that the staff met its burden of proof on this issue, but that the effect of the mismanagement being profound was not clear. We find this point not to be actionable.

Joan Adcock was very pleasant and quite credible. We find that she saw that there was a demand for the good works that en offered the community (Little Rock School District and the Hope Center) and that she supported its efforts. We also deduced that she deemed Judge Proctor to be leading a worthy cause in a way she believed in. She has a political career and a reputation that could not be risked by entangling herself with a figure who could cause it damage.

It could be gathered from the testimony of Karla Burnett and Steve Sipes, along with others, that Proctor's collection of money was prompted by Comptroller Ron Quillen's purchase of software that was substandard to that already in use by County Treasurer Debra Buckner.

Before the clerk's office began to collect the money, the money needed to be collected by someone. We deduce that Proctor's decision to assume that duty is consistent with his personality to exhibit control as well as his propensity to solve a problem needing fixing. The fact that the County and CB, Inc. agreed to share the fees equally so is significant because it would tend to suggest to Proctor that this was acceptable.

Janelle Honorable was credible in her description of Judge Proctor. She did not witness any untoward conduct of the judge. She offered some explanation or problems with the restitution account.

Judge Proctor testified twice. He admitted to CB and CB, Inc. looking a lot alike. He admitted to having contact with a number of his probationers at hi home and in his office that we find was not distant at all and clearly was "up close and personal". He admitted to sending money to Demoreo Davis while Davis was in the ADC, knowing s name would be linked to the money. He

admitted to creating the concept of "civil probation. He admitted that probationers were placed on the Board of Directors. He admitted to "taking some risk" with the way CB was conducted and how he conducted himself.

Analysis and Factual Conclusions

We find that the following words and phrases come to mind when assessing Judge Proctor and his motives, noble, creative, progressive, innovative, altruistic, admirable, visionary, cutting edge. His mannerisms are polite, kind, and gentle in nature. It is obvious that his motives were nothing other than pure, that he loves his job and loves helping people, and that all of that which was before us was and is his life; it is indeed his passion. It s evident that he is loaded with energy, and he is accustomed to a pace faster than most, and much faster than Pulaski County is used to running or is equipped to run. At one point it was testified he stated that "Quickbooks wasn't good enough." That supports moreover the idea that he had energy to spend. That energy was clearly addictive among his staff. The ladies who called themselves "Charlie's Angels" and wore the same clothes indicates that, despite testimony that morale could be low in his office, morale was often high also. Courts are traditionally run n a steadier, more consistent basis, with less swinging between emotions.

Civil probation is clearly not in the Arkansas statutes; by the same token we find nothing that prohibits Proctor's practices. A defendant is to be sentenced within thirty days under Rule 33.2 of the Arkansas Rules of Criminal Procedure. We see nothing that keeps the State from claiming relief under this rule. Surely the State has a right to disposition of a case also. By the same token, we see no authority for jailing an individual for unpaid probation fees, whether to CB, the county or the State of Arkansas.

Clearly the most troubling testimony is the Demoreo Davis living arrangement and money payments to him at the penitentiary, as well as the car rides furnished to him and other defendants. The unfettered access to the judge's office is less shocking, but seems incredibly risky and made some employees nervous. If purses, coats, and other personal effects were within reach, anyone would be nervous, including those who interact with offenders for a living. There was testimony that some of them helped move things around the office; one could wonder whether this would have been a worker's compensation risk.

Equally dangerous was the practice of having probationers serving as 11 of 15 board members of CB, Inc. This is clearly an overwhelming majority

of board members, all on felony probation, who by all aspects of corporate law were in control of hiring and firing CB, Inc. officers. These officers were the same people supervising them on probation, controlling and disbursing hundreds of thousands of dollars of money, and creating and maintaining the records that would show compliance, or more importantly non-compliance with probation rules. A simple board vote could have done an incredible amount of damage to the status of business in 5th Division. Proctor's inability to see, or refusal to admit, the dangers inherent in this type of arrangement cannot be overlooked.

The following are some of the more striking quotes attributed to Judge Proctor: "I could kill you", "You are my disciples, and I am God", "Let's touch and agree ... God strike her dead."

Some witnesses who would be in a position to hear Judge Proctor ay these things deny ever hearing them. Others were convincing in their testimony. We suspect that Proctor did in fact make some of these statements "under his breath" as he said he did, but was careful who he knew would hear him say them. In other words, those who at one time were in his trust would be more likely to hear him. What is significant is that we did not hear of an occasion that a probationer or a member of the public heard any of these matters. Frustration is

bound to occur in a workplace. This type of matter does not offend us if it is restricted to those one works with. However, Proctor and all judges should employ much more caution the future in this regard.

Most of CB issues were unchallenged or not resisted by the quorum court, the county judge, other attorneys working within courthouse; in fact the county seemed perfectly content to spend CB funds raised It also appears that reputable, established people and entities like City Director Joan Adcock, the Little Rock School District, and the Hope Center were working in conjunction with CB. Judge Proctor may have needed to more closely examine and assess his own ethics but the fact that this went on as long as it did without formal challenges and even some outside public support gives us great pause and weighs heavily in our decision.

Findings of Fact

Cycle Breakers relationships

Judge Willard Proctor, Jr. created the Cycle Breakers program.

Judge Willard Proctor, Jr. gave docket priority to matters involving Cycle Breakers, Inc. fees.

There was no real division between Cycle Breakers, Inc., 5th Division Circuit Court and Judge Proctor.

Judge Willard Proctor, Jr. controlled nearly 100% of the revenues f Cycle Breakers, Inc. through his judicial powers of sentencing and enforcing probation conditions.

Judge Willard Proctor, Jr. presented a "profit and loss" statement regarding 5th Division fees to a bank for consideration as to the creditworthiness of Cycle Breaker, Inc.

Judge Willard Proctor, Jr. participated, attended or led a significant number of Cycle Breakers, Inc. meetings that included current 5th Division probationers.

Judge Willard Proctor, Jr. took a significant role in Cycle Breakers Inc. corporate meetings including taking minutes, opening meetings, presenting corporate information and giving advice or leadership to the organization.

Judge Willard Proctor, Jr. handled banking duties for Cycle Breakers, Inc. accounts.

Cycle Breakers, Inc. paid for thousands of dollars in 5th Division Circuit Court expenses at the direction of Judge Willard Proctor, Jr.

Judge Willard Proctor, Jr. ordered his employees who were signatories of Cycle Breakers, Inc. accounts to sign blank checks and leave them for him to negotiate.

Judge Willard Proctor, Jr. acted as a non-legal advisor to Cycle Breakers, Inc.

Judge Willard Proctor, Jr. acted as the de facto leader of Cycle Breakers, Inc.

Cycle Breakers, Inc. was the alter ego of Judge Willard Proctor, Jr.

Probationer relationships

Judge Willard Proctor, Jr. allowed Demoreo Davis to live with him on certain weekends to keep Davis from using drugs while Davis was a 5th Division probationer.

Judge Willard Proctor, Jr. allowed Demoreo Davis to live with hi for over a week while Davis was a 5th Division probationer.

Judge Willard Proctor, Jr. allowed Demoreo Davis and other current probationers to come to his personal residence.

Judge Willard Proctor, Jr. gave rides in his personal vehicle to at list eight current 5th Division probationers.

Judge Willard Proctor, Jr. told current probationers that he might I se his judgeship for following his vision to help them.

Judge Willard Proctor, Jr. selected "intensive probationers", some of whom would have superior access to the Judge and his offices.

Judge Willard Proctor, Jr. would eat lunch with current probationers in his office.

Judge Willard Proctor, Jr. sent $450 to Demoreo Davis' prison account after he sentenced Davis to 10 years in the Department of Correction.

Judge Willard Proctor, Jr. does not think that sending money to a prisoner that he sentenced is inappropriate or raises the appearance of impropriety.

Staff Treatment

Judge Willard Proctor, Jr. used injudicious terms such as "devil", "lying ho", "ho", "cracker", "wench", "witch" and other words or phrases to describe staff members or others.

Judge Willard Proctor, Jr. coerced staff members into working for Cycle Breakers, Inc.

Ex parte communications

Judge Willard Proctor, Jr. personally collected money from probationers as part of 5th Division probation.

Complying with the law

Judge Willard Proctor, Jr. failed to comply with the law through hi improper involvement with Cycle Breakers, Inc. and by enforcing payment of "civil fees" fro these defendants with the jail or with the threat of jail, knowing the money would go to his non- profit corporation.

Conclusions of Law

Cycle Breakers, Inc
Judge Proctor willfully violated Canon 2 B by preparing a "profit loss" statement for his Division and sending it to the bank for a determination of the creditworthiness of Cycle Breakers, Inc.

Judge Proctor served as an officer, director, trustee or-non-legal advisor of an organization that was be engaged in proceedings that ordinarily came before the judge in violation of Canon 4 C.

Judge Proctor willfully violated Canon 4 C by lending the prestige of his office to a private corporation by preparing a "profit & loss" statement loss his Division and sending it to the bank for a determination of the credit worthiness of Cycle Breakers, Inc.

Judge Proctor willfully violated Canon 4 A of the Code by involving himself in the operation of Cycle Breakers, Inc. to the extent that it cast reasonable doubt on the judge's capacity to act impartially as a judge.

Judge Proctor willfully violated Canon 4 A of the Code by personally involving himself with party defendants in his Court to the extent that it cast reasonable doubt on the judge's capacity to act impartially as a judge.

Probationer Relationships

Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by sending

money to a convicted robber that he sentenced to the Department of Corrections.

Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by allowing a party defendant in his Court to live at the Judge's personal residence for over a week.

Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by allowing a party defendant in his Court to live at the Judge's personal residence on certain weekends.

Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by giving rides in his personal vehicle to at least eight (8) party defendants.

Judge Proctor willfully violated Canon 2 by failing to avoid the appearance of impropriety by having inappropriate contact with party defendants subject to his jurisdiction.

Judge Proctor willfully violated Canon 3 B(7) by engaging in ex parte contact with party defendants subject to his jurisdiction.

Judge Proctor willfully violated Canon 4 A of the Code by stating hat he knew he might lose his

judicial office based on his actions regarding party defendants subject to his jurisdiction.

Judge Proctor willfully violated Canon 4 A of the Code by allowing his personal interests regarding rehabilitating criminals to be superior to his sworn duty s a judge.

Treatment of Staff

Judge Proctor willfully violated Canon 3 B(4) by coercing his staff into working for Cycle Breakers, Inc.

Ex parte communications

Judge Proctor willfully violated Canon 3 B(7) by having improper contact with party defendants within his jurisdiction.

Respect and Comply with the Law

Judge Proctor willfully violated Canon 2 A of the Code by failing to respect and comply with the law by ignoring and by-passing laws that were an impediment to his interest in Cycle Breakers, Inc.

Judge Proctor willfully violated Canon 2 A of the Code by failing to respect and comply with the law by enforcing payment of "civil fees" from these

defendants with the jailor with the threat of jail, knowing the money would go to his non-profit corporation.

Ten Factors

When deciding what discipline is appropriate the Arkansas Supreme Court offered ten factors to consider in Judicial Discipline &: Disability Commission v. Thompson, 341 Ark. 253, 16 S.W. 3d 212 (2000). The ten factors are:

(a) whether the misconduct is an isolated instance or evidenced a pattern of conduct:

(b) the nature, extent and frequency of occurrence of the acts of mi conduct;

(c) whether the misconduct occurred in or out of the courtroom;

(d) whether the misconduct occurred in the judge's official capacity or in his private life;

(e) whether the judge has acknowledged or recognized that the act occurred;

(f) whether the judge has evidenced an effort to change or modify is conduct;

(g) the length of time of service on the bench;

(h) whether there have been prior complaints about this judge;

(i) the effect the misconduct has upon the integrity of and respect r the judiciary;

(j) the extent to which the judge exploited his position to satisfy hi personal desires.

There is ample evidence in the record to show that this 1) as a pattern of conduct, 2) was of a serious nature and extent, with regular frequency, 3) happened both in and out of the courtroom, 4) occurred largely in the judge's official capacity, 5) has partially admitted by the judge, partially not. Judge Proctor seems to have largely modified is conduct in many of the details in these complaints. He has been on the bench for only eight years, and in that time one other prior complaint arose and went to a hearing, one that is related and more significant now than then. The extent of exploitation of his position for his persona desires is present and worth considering, but we find that the effect that the misconduct has had and could continue to have, upon the integrity and respect for the judiciary is profound.

Opinion as to discipline

Given all of that which is before the full commission, it is our belief that there is compelling proof, and there are, as well, compelling reasons for Judge Proctor to be removed from the bench for the Demoreo Davis allegations alone. The cent ct and interaction the judge had with Demoreo Davis, alone in his home, alone in car rides, in e office, and, most of all, in the fact and in the manner that

Proctor sent money to him at the ADC are beyond reproach.

These allegations alone require this three-member panel to find unanimously that Judge Willard Proctor, Jr. should be removed from the bench. If the Demoreo Davis allegations are not accepted by the full Commission or by the Arkansas Supreme Court for any reason, which we find there is none, there are other remaining allegations that we have found as fact and have concluded as violations of law. It is our belief that while actionable as misconduct. There are modes of punishment it more measured and less drastic than removal that could address and sanction the allegation sustained. All of the problems set forth within the complaints before us occurred while Proctor disposed of a criminal docket, not a civil docket. A lesser punishment that seems fitting to us for the remainder of the allegations would be a six-month suspension from the bench, without pay for three months, with pay for three months, as well as a fine or assessment of $25,000.0 to be paid for the costs of the staffs investigation and prosecution of this petition and these case, and a directive from the Arkansas Supreme Court that Judge Proctor be relieved of conducting criminal and juvenile dockets so long as he serves as a judge in this state, restricting his caseload to handling civil and/or probate matters only.

Motions Filed May 22, 2009 by Judge Proctor

The motions should be denied.

s/
Judge Leon Jamison, Chairman

s/
Jerry Larkowski

s/
Chuck Dearmon

ADDENDUM D

STATUTES

Amendment 66. Judicial Discipline and Disability Commission

(a) COMMISSION: Under the judicial power of the State, a Judicial Discipline and Disability Commission is established and shall be comprised of nine persons: three justices or judges, appointed by the Supreme Court; three licensed attorneys in good standing who are not justices or judges, one appointed by the Attorney General, one by the President of the Senate, and one by the Speaker of the House; and three members appointed by the Governor. The members appointed by the Governor shall not be justices or judges, retired justices or judges, or attorneys. Alternate members shall be selected and vacancies filled in the same manner.

(b) DISCIPLINE, SUSPENSION, LEAVE, AND REMOVAL: The Commission may initiate, and shall receive and investigate, complaints concerning misconduct of all justices and judges, and requests and suggestions for leave or involuntary disability retirement. Any judge or justice may voluntarily request that the Commission recommend suspension because of pending disciplinary action or leave because of a

mental or physical disability. Grounds for sanctions imposed by the Commission or recommendations made by the Commission shall be violations of the professional and ethical standards governing judicial officers, conviction of a felony, or physical or mental disability that prevents the proper performance of judicial duties. Grounds for suspension, leave, or removal from office shall be determined by legislative enactment.

(c) DISCIPLINE: If, after notice and hearing, the Commission by majority vote of the membership determines that grounds exist for the discipline of a judge or justice, it may reprimand or censure the judge or justice, who may appeal to the Supreme Court. The Commission may, if it determines that grounds exist, after notice and hearing, and by majority vote of the membership, recommend to the Supreme Court that a judge or justice be suspended, with or without pay, or be removed, and the Supreme court, en banc, may take such action. Under this amendment, a judge who also has executive or legislative responsibilities shall be suspended or removed only from judicial duties. In any hearing involving a Supreme Court justice, all Supreme Court justices shall be disqualified from participation.

(d) LEAVE AND RETIREMENT: If, after notice and hearing, the Commission by majority vote of

the membership determines that a judge or justice is unable because of physical or mental disability to perform the duties of office, the Commission may recommend to the Supreme Court that the judge or justice be granted leave with pay or be retired, and the Supreme Court, en banc, may take such action. A judge or justice retired by the Supreme Court shall be considered to have retired voluntarily as provided by law.

(e) VACANCIES: Vacancies created by suspension, the granting of leave or the removal of a judge or justice, or vacancies created by disqualification of justices, shall be filled as provided by law.

(f) RULES: The Supreme Court shall make procedural rules implementing this amendment and setting the length of terms on the Commission.

(g) CUMULATIVE NATURE: This amendment is alternative to, and cumulative with, impeachment and address

Arkansas Code Annotated § 16-10-410. Grounds for removal

(a) The grounds for removal conferred by this subchapter shall be both alternative and cumulative to the power of impeachment provided by the Arkansas Constitution and removal

otherwise provided by law.

(b) A judge may be removed from office on any of the following grounds:

(1) Conviction of any offense punishable as a felony under the laws of Arkansas or the United States;

(2) Conviction of a criminal act that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge in other respects;

(3) The commission of conduct involving dishonesty, fraud, deceit, or misrepresentation;

(4) The commission of conduct that is prejudicial to the administration of justice;

(5) Willful violation of the Arkansas Code of Judicial Conduct or the Model Rules of Professional Conduct;

(6) Willful and persistent failure to perform the duties of office; or

(7) Habitual intemperance in the use of alcohol or other drugs.

(c) In considering recommending removal, the

Judicial Discipline and Disability Commission may consider the frequency of the offense, the motivation of the conduct, the length of time since the conduct in question, and similar factors.

(d) Any judge removed from office pursuant to this subchapter cannot be appointed or elected thereafter to serve as a judge.

ARKANSAS CODE OF JUDICIAL CONDUCT
TEXT OBTAINED BY WORLD WIDE WEB PAGE: COURTS.STATE.AR.US; 28th APRIL, 2003.

Preamble.

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as

not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards

which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Terminology.

"Appropriate authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D.(1) and 3D.(2).
"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).
"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Sections 3E(1)(c) and 3E(1)(d).
"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:
(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

See Sections 3E(1)(c) and 3E(2).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 4E.

"Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Sections 3D, 3E(1), and 5A(3).

"Law" denotes court rules as well as statutes, constitutional provisions and decisional law. See

Sections 2A, 3A, 3B(2), 3B(6), 4B, 4C, 4D(5), 4F, 4I, 5A(2), 5A(3), 5B(2), 5C(1), 5C(3) and 5D.

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D(3), 4E and 4G.

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Sections 3E(1) and 4D(5).

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports. See Section 3B.(11).

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3B(3), 3B(4), 3B(6), 3B(9) and 3C(2).

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Section 3E(1)(d).

Canon 1. A judge shall uphold the integrity and independence of the judiciary.
An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary:
Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and

thereby does injury to the system of government under law.

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct

would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

See also Commentary under Section 2C.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Commentary:

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used to gain a personal

advantage or to effect an economic advantage. Letters of recommendation may be written on judicial stationery based on personal knowledge of the applicant, but not merely for the purpose of lending the prestige of the judicial office to the applicant.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being

considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

Commentary:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant

factors. An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by state law also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club.

A judge may ordinarily be a member of an organization which is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited, even though that organization is a single sex or single race organization. Likewise, a judge may ordinarily be a member of an organization which is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, even though in fact its membership is limited. Similarly, a judge may have or retain

membership with a university related or other living group, even though its membership is single sex. However, public approval of, or participation in, any discrimination that gives the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary violates this Code. For example, an organization that conducts lobbying or advocacy on behalf of its members may raise such concerns. Ultimately, each judge must determine in the judge's own conscience whether participation in such an organization violates Canon 2 and Section 2A. When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the

performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, or national origin, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control. A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, or national origin, or other similar factors, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, or national origin, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and

seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal

capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Arkansas Rules of Professional Conduct.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary:

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting

bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. No judge shall employ a spouse or other relative unless it has been affirmatively demonstrated to the Arkansas Judicial Discipline and Disability Commission that it is impossible for the judge to hire any other qualified person to fill the position. A judge

shall not approve compensation of appointees beyond the fair value of services rendered. (Amended by Per Curiam November 19, 1990, effective July 1, 1991.)

Commentary:

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Nepotism is the appointing of relatives within the third degree of relationship by affinity or consanguinity. The relationship is determined as of the time of appointment. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by section 3C(4).

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall either communicate directly with respect to the violation with the judge who has committed the violation or report the violation to the Judicial Discipline and Disability Commission.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed

a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall either communicate directly with respect to the violation with the lawyer who has committed the violation or report the violation to the Arkansas Supreme Court Committee on Professional Responsibility.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil actions predicated thereon may be instituted against the judge.

(4) Sections 3D(1) and 3D(2) shall not apply to a member of the Lawyer Assistance Committee ("the Committee") of the Arkansas Lawyer Assistance Program ("ALAP") or a volunteer serving pursuant to Rule 4 of the Rules of ALAP regarding information received in one's capacity as a Committee member or volunteer, acting in good faith, unless it appears to said member or volunteer that the lawyer or judge in question, after entry into the ALAP, is failing to desist from said violation, or is failing to cooperate with a program of assistance to which said lawyer or judge has agreed, or is engaged in the sale of a controlled

substance or theft of property constituting a felony under Arkansas law, or the equivalent thereof if the offense is not within the State's jurisdiction.

(5) Except as provided by the preceding subsection 3D(4), and Rules 7(B) and 10 of the Rules of ALAP, no information received, gathered, or maintained by the Committee, its members or volunteers, or by an employee of the ALAP in connection with the work of the Committee may be disclosed to any person nor be subject to discovery or subpoena in any administrative or judicial proceeding, except upon the express written release of the subject lawyer or judge. However, the Committee may refer any lawyer or judge to a professional assistance entity, and may, in good faith, communicate information to the entity in connection with the referral. If information obtained by a member of the Committee, a volunteer, or an employee of the ALAP gives rise to reasonable suspicion of a direct threat to the health or safety of the subject lawyer, judge or other person, then the obligation of confidentiality set forth in this subsection 3D(5) shall not apply, and the Committee member, volunteer, or ALAP employee may make such communications as are necessary for the purpose of avoiding or preventing said threat.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might

reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal

knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questionable because of such association.

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding.
Commentary:
The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.
(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.
F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis

for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

Canon 4. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
(2) demean the judicial office; or
(3) interfere with the proper performance of judicial duties.

Commentary:

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, or other similar factors. See Section 2C and accompanying Commentary.

B. Avocational Activities. A judge may speak, write, lecture, teach on and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Commentary:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To

the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

Commentary:

See Section 2B regarding the obligation to avoid improper influence.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Commentary:

Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Section 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Section 4C(2) does not govern a judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational

institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

Commentary:

Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).

See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions

of Canon 4 in addition to Section 4C. For example, a judge is prohibited by Section 4G from serving as a legal advisor to a civil or charitable organization.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Commentary:

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the

management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary: A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to

the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority; 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere

attendance at such an event is permissible if otherwise consistent with this Code.

D. Financial Activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

Commentary:

The Time for Compliance provision of this Code (Application, Section D) postpones the time for compliance with certain provisions of this Section in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an

appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

Commentary:

This Section provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members

of the judge's family, and investments owned jointly by the judge and members of the judge's family.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family, or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

Commentary:

Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household, not to accept, a gift, bequest, favor or loan from anyone except for:

Commentary:

Section 4D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.

Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official

use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

Commentary:

Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B.

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or

birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary:

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(5)(e).

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

Commentary:

Section 4D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or

their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary: The Time for Compliance provision of this Code (Application, Section D) postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if

detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(4).

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

Commentary:

Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

G. Practice of Law. A judge shall not practice law or appear as counsel in any court within this state. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

Commentary:

This prohibition refers to the practice of law in a representative capacity under the Arkansas Constitution, Article 7, § 24 and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2(B).

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

H. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. The judge's report shall be made at least annually and shall be filed as a public document in the office of the Clerk of the Supreme Court.

Commentary:
See Section 4D(5) regarding reporting of gifts, bequests and loans.
The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.
Compensation for purposes of public reporting includes compensation received for quasi-judicial and extra-judicial activities permitted by the Code, including compensation received for speaking, writing, lecturing, teaching, and similar activities. As has been the recognized interpretation given this Code for twenty-six years, compensation for purposes of public reporting does not include income from investments or from business activities as permitted by Canon 4(D)(2) and 4(D)(3). (Section H Commentary amended by Per Curiam September 21, 2000.)

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.
Commentary:
Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest" as explained in the Terminology Section. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section H requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

Rules of Procedure of the Arkansas Judicial Discipline and Disability Commission

Rule 1. Organization of commission.

A. Composition of Commission. In accordance with Ark. Const. Amend. 66 and Act 637 of 1989, the commission on Judicial Discipline and Disability shall have nine members who shall be residents of

Arkansas. Three members shall be justices or judges appointed by the Supreme Court (judicial members); three shall be lawyers admitted to practice in this state, who are not justices or judges, one appointed by the Attorney General, one by the President of the Senate, and one by the Speaker of the House of Representatives (lawyer members); and three members who are neither lawyers nor sitting or retired justices or judges shall be appointed by the Governor (public members).

B. Meetings. The Commission shall hold an organization meeting immediately upon establishment and biannually thereafter, and shall meet at least monthly at announced dates and places, except when there is no business to be conducted. Meetings shall be called by the Chairman or upon the written request of three members of the Commission.

C. Terms of Commission Members and Alternates. With the exception of the initial appointees, whose initial terms shall be made so that reappointments and later appointments are to be staggered, Commission members and alternates shall serve for terms of six (6) years and shall be eligible for reappointment to second full terms. (Initial appointees shall be eligible for second terms of six (6) years.) At its organization meeting, the

members of the Commission shall draw for lengths of initial terms so that one member in each group of members, judicial, lawyer, and public, shall have a four (4) year initial term, one member in each group shall have a five (5) year term, and one member in each group shall have a six (6) year term. After the terms of the initial appointees have been established, slips of paper, each with the name of the alternate, shall be placed in a container. Each member shall draw one of the slips of paper, and the alternate whose name is thus drawn shall have the same length of term as the member who drew his or her name.

D. Officers. At the organization meeting the members of the Commission shall elect one among them to serve as chairman and another to serve as vice-chairman. The vice-chairman shall perform the duties of the chairman whenever he is absent or unable to act.

E. Quorum; Voting Requirements. Five members of the Commission shall constitute a quorum for the transaction of business. A finding of probable cause shall require the concurrence of a majority of the members present.

Any alternate member may serve in the place of any member of the same category whenever such member is disqualified or unable to serve and upon

the call of, or on behalf of, the chairman. An alternate member who is present at a Commission meeting but who has not been called to serve may neither be included in a quorum count nor vote on any matter being considered at such meeting. Whenever an alternate member is called to serve in the place of a member of the Commission, an announcement with respect thereto shall be made at the commencement of the meeting.

A recommendation that discipline be imposed shall require the concurrence of a majority of the members of the Commission.

Rule 2. Powers and duties of the commission.

A. Rules and Forms. The Commission may recommend to the Supreme Court adoption or amendment of rules with regard to all disciplinary and disability proceedings, promulgate additional rules of procedure not inconsistent with these rules, and require the use of appropriate forms.

B. Annual Report. The Commission shall have prepared an annual report of its activities for presentation to the Supreme Court and the public at the end of each calendar year.

Rule 3. Financial arrangements for commission.

A. Compensation Proscribed. The Commission members shall serve without compensation for their services.

B. Expenses Allowed. The Commission members shall be reimbursed for expenses necessarily incurred in the performance of their duties.

C. Authorization for Payments. Expenses of the Commission as provided in section 2.(d) of Act 637 of 1989, shall be authorized to be paid in accordance with the approved Commission budget.

Rule 4. Commission office.

The Commission shall establish a permanent office in a building open to the public. The office shall be open and staffed at announced hours.

Rule 5. Duties of the director.

The Commission shall prescribe the duties and responsibilities of the director which shall include the authority to:

(1) Consider information from any source and receive allegations and complaints;

(2) Make preliminary evaluations;

(3) Screen complaints;

(4) Conduct investigations;

(5) Maintain and preserve the Commission's records, including all complaints, files and written dispositions;

(6) Maintain statistics concerning the operation of the Commission and make them available to the Commission and to the Supreme Court;

(7) Prepare the Commission's budget for its approval and administer its funds;

(8) Employ and supervise other members of the Commission's staff;

(9) Prepare an annual report of the Commission's activities; and

(10) Employ, with the approval of the Commission, special counsel, private investigators or other experts as necessary to investigate and process matters before the Commission and before the Supreme Court.

Rule 6. Jurisdiction.

A. Judge in Office. The authority of the Commission extends to judges and justices in office, and the term "judge" includes anyone, whether or not a lawyer, who is an officer of the judicial system

performing judicial functions, including an officer such as a referee, special master, court commissioner, [or] magistrate, whether full-time or part-time. Allegations regarding conduct of a judge or justice occurring prior to or during service in judicial office, including the service of a retired judge who has been recalled, are within the jurisdiction of the Commission and shall be considered by it.

B. Former Judge. Conduct of a former judge which has been adjudicated by a final decision reached by the Commission shall not become the subject of disciplinary proceedings before the Supreme Court Committee on Professional Conduct.

Rule 7. Disclosure.

A. Any action taken by the Commission after investigation of a judge shall be communicated to the judge by letter which shall become public information. If the allegations leading to the investigation have proven to be groundless, the letter to the judge shall so state. [See Rule 8.B. and Rule 9.E.(1).] If the Commission decides not to proceed to formal charges but to admonish the judge, to recommend a change in conduct, or to impose conditions upon future conduct, such as obtaining treatment or counseling, the letter shall

set forth the facts leading to the admonition or required adjustment.

B. If the Commission finds it necessary to file formal charges against a judge and to proceed to a hearing, the charges and the hearing shall be open to the public as shall the records of formal proceedings. The Commission may, however, conduct its deliberations in executive session which shall not be open to the public. Any decision reached by the Commission in such an executive session shall be announced in a session open to the public.

C. Investigatory records, files, and reports of the Commission shall be confidential, and no disclosure of information, written, recorded, or oral, received or developed by the Commission in the course of an investigation relating to alleged misconduct or disability of a judge, shall be made except as stated in A. and B. above or as follows:

(1) Upon waiver in writing by the judge under consideration at any stage of the proceedings;

(2) Upon inquiry by an appointing authority or by a state or federal agency conducting investigations on behalf of such authority in connection with the selection or appointment of judges;

(3) In cases in which the subject matter or the fact of the filing of charges has become public, if deemed appropriate by the Commission, it may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, and to state that the judge denies the allegations;

(4) Upon inquiry in connection with the assignment or recall of a retired judge to judicial duties, by or on behalf of the assigning authority;

(5) Where the circumstances necessitating the initiation of an inquiry include notoriety, or where the conduct in question is a matter of public record, information concerning the lack of cause to proceed shall be released by the Commission;

(6) If during the course of or after an investigation or hearing the Commission reasonably believes that there may have been a violation of any rules of professional conduct of attorneys at law, the Commission may release such information to any committee, commission, agency or body within or outside the State empowered to investigate, regulate or adjudicate matters incident to the legal profession; or

(7) If during the course of or after an investigation or hearing, the Commission reasonably believes that there may have been a violation of criminal law, the Commission shall release such information to the appropriate prosecuting attorney.

D. It shall be the duty of the Commission and its staff to inform every person who appears before the Commission or who obtains information about the Commission's work of the confidentiality requirements of this rule.

E. Any person who violates the confidentiality requirements of this rule shall be subject to punishment for contempt of the Arkansas Supreme Court.

Rule 8. Procedures of commission regarding conduct of a judge.

A. Initiation of Inquiry. In accordance with these rules, any information submitted by a complainant or otherwise brought to the attention of the Commission stating facts that, if true, would be grounds for discipline shall initiate an inquiry relating to the conduct of the judge. The Commission on its own motion may make inquiry with respect to the conduct of a judge.

B. Screening. Upon receipt of a complaint or other information as to conduct that might constitute grounds for discipline of a judge, the executive officer shall make a prompt, discreet, and confidential investigation and evaluation. Under guidelines approved by the Commission, and in light of the initial investigation and evaluation, the executive officer shall determine whether there exists sufficient cause to proceed to a probable cause determination.

The executive officer shall dismiss all complaints for which sufficient cause to proceed is not found. A report as to matters so dismissed shall be furnished to the Commission at its next meeting. The complainant, if any, and the judge, if he has been given notice thereof, shall be informed in writing of the dismissal.

C. Optional Notice to the Judge. Notice to the judge that a complaint has been received or an inquiry undertaken may be given at any time.

D. Mandatory Notice to the Judge. Except upon good cause shown and with the approval of the Commission, no action other than dismissal of the complaint shall be taken as to any complaint about which the judge is not notified within ninety (90) days of the receipt of such complaint.

E. Sworn Complaint or Statement in Lieu of Complaint. If, after initial investigation and evaluation, it appears that there is sufficient cause to proceed, the complainant, if any, shall be asked to file a detailed, signed, sworn complaint against the judge. The sworn complaint shall state the names and addresses of the complainant and the judge, the facts constituting the alleged misconduct and, so far as is known, whether the same or a similar complaint by that complainant against that judge has ever been made to and considered by the Commission. Immediately upon receipt of the sworn complaint, the executive officer shall make written acknowledgement thereof to the complainant.

When a sworn complaint is not obtained, a clear statement of the allegations against the judge and the alleged facts forming their basis shall be prepared by the executive officer.

When more than one act of misconduct is alleged, each should be clearly set forth in the sworn complaint or in the statement in lieu of complaint, as the case may be.

F. Commencement of the Case. Upon receipt of each sworn complaint or the preparation of a statement in lieu thereof, a file shall be opened in the Commission office.

G. Required Notice. The judge shall immediately be served with a copy of the sworn complaint or statement of allegations.

H. Answer. Within twenty (20) days after the service upon him of the sworn complaint or statement, the judge shall file a written answer with the executive officer. The answer may include a description of circumstances of a mitigating nature bearing on the charge. A personal appearance before the Commission shall be permitted in lieu of or in addition to a written response. If the judge elects to appear personally his statement shall be recorded verbatim.

I. Review Prior to Probable Cause Determination. Upon receipt and review of the judge's answer, the Commission may terminate the proceeding and dismiss the complaint and, in that event, shall give notice to the judge and each complainant that it has found insufficient cause to proceed.

J. Amending Allegations. Amendment of the allegations regarding the misconduct of a judge, whether presented to the Commission in a sworn complaint or in a statement in lieu thereof, shall be permitted prior to a finding of probable cause, provided that notice thereof and an opportunity further to respond within ten (10) days is given to the judge.

K. Right to Counsel. The judge shall be entitled to counsel of his own choice.

L. Subpoenas and Summonses. The Commission has the authority to issue summonses for any person(s) and subpoenas for any witness(es), including the judge concerned, and for the production of papers, books, accounts, documents, records, or other evidence and testimony relevant to an investigation or proceeding. Such process shall be issued by and under the seal of the Commission and be signed by the Chairman, Vice-Chairman or the Executive Director. The summonses or subpoenas shall be served in any manner provided by the Arkansas Rules of Civil Procedure for service of process. Upon receiving notice from the Commission of the pendency of a proceeding, the judge concerned shall be entitled to compel, by subpoena issued in the same manner, the attendance and testimony of witnesses, and the production of papers, books, accounts, documents and testimony relevant to the investigation or the proceeding. The Commission shall provide for its use a seal of such design as it may deem appropriate. The Circuit Court of Pulaski County shall have the power to enforce process.

M. Immunity. The Commission is authorized to request the appropriate prosecuting authorities to seek to obtain immunity from criminal prosecution

for a reluctant witness, using the procedure found in Ark. Code Ann. §§ 16-43-601 through 16-43-606.

Rule 9. Probable cause.

A. Establishment of Grounds of Discipline. The grounds for discipline are those established in part (b) of Ark. Const., Amend. 66 and those established by Act 637 of 1989.

B. Distinguished from Appeal. In the absence of fraud, corrupt motive or bad faith, the Commission shall not taken action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he understands it. Claims of error shall be considered only in appeals from court proceedings.

C. Probable Cause Determination. The Commission shall promptly schedule and hold a formal meeting at which the strict rules of evidence need not be observed. A complete verbatim record shall be made. All witnesses shall be duly sworn. A complainant and the judge against whom he has complained shall have the right to be present, with their attorneys, if any, except during Commission deliberations.

D. Findings and Report. The Commission shall prepare a written report containing its findings of

fact and its conclusions on each issue presented, and shall file its report with the executive officer.

E. Disposition. In its report the Commission shall dispose of the case in one of the following ways:

(1) If it finds that there has been no misconduct, the director shall be instructed to send the judge and each complainant notice of dismissal.

(2) If it finds, by concurrence of a majority of members present, that there has been conduct that is or might be or might become cause for discipline but for which an admonition or informal adjustment is appropriate, it may so inform or admonish the judge, direct professional treatment, counseling, or assistance for the judge, or impose conditions on the judge's future conduct.

(3) If it finds, by concurrence of a majority of members present, that there is probable cause to believe that there has been misconduct of a nature requiring a formal disciplinary proceeding, the director shall cause the judge to be served with the report, the formal statement of the charges, the record of the probable cause determination, and all documents upon which the determination was based. The service upon the judge constitutes notice that he must respond within [twenty] (20) days.

Rule 10. Interim sanctions.

A. Suspension with Pay. In instances of the (1) filing of an indictment or information charging a judge with a felony under state or federal law, or (2) the filing of a misdemeanor charge against a judge or justice where his ability to perform the duties of his office is adversely affected, the Commission shall convene within ten (10) days for the purpose of considering a recommendation to the Supreme Court that the judge or justice be temporarily suspended with pay pending the outcome of any disciplinary determination.

B. Effect on Commission Action. A temporary suspension with pay as an interim sanction shall not preclude action by the Commission with respect to the conduct that was the basis for the felony or misdemeanor charge, nor shall the disposition of the charge in any manner preclude such action.

Rule 11. Formal disciplinary hearing.

A. Scheduling. The Commission shall, upon receipt of the judge's response or upon expiration of the time to answer, schedule a public hearing not less than thirty (30) nor more than forty-five (45) days thereafter, unless continued for good cause shown. The judge and all counsel shall be notified promptly of the date, time, and place of hearing.

B. Discovery. The judge and the Commission shall be entitled to discovery in accordance with the Arkansas Rules of Civil Procedure.

C. Factfinder. The formal hearing shall be conducted before a factfinder which may be the entire Commission or a three-member panel thereof appointed by the Commission chairman.

D. Conduct of Hearing. The Arkansas Rules of Evidence apply and all testimony shall be under oath. Commission attorneys, or special counsel retained for the purpose, shall present the case to the factfinder. The judge whose conduct is in question shall be permitted to adduce evidence and cross-examine witnesses. Facts justifying action shall be established by clear and convincing evidence. The proceedings shall be recorded verbatim.

E. Amendment of Allegations. By leave of the Commission or by consent of the judge, the formal charges may be amended after commencement of the public hearing only if the amendment is technical in nature and if the judge and his counsel are given adequate time to prepare a response.

F. Determination. A factfinder other than the entire Commission shall, within sixty (60) days after the hearing, submit its findings and

recommendation, together with the record and transcript of the proceedings, to the Commission for review and shall contemporaneously serve them upon the judge.

The judge, or Commission counsel, may submit written objections to the findings and recommendations.

The findings, conclusions and accompanying materials, together with the objections, if any, shall be promptly reviewed by the Commission.

The Commission may make independent findings of fact from the record or, if the entire Commission served as factfinder, it shall prepare its findings and recommendations.

G. Commission Decision. The recommendations for discipline shall be concurred in by a majority of all members of the Commission and may include one or more of the following:

(1) A recommendation to the Supreme Court that the judge be removed from office;

(2) A recommendation to the Supreme Court that the judge be suspended, with or without pay;

(3) Upon a finding of physical or mental disability, a recommendation to the Supreme Court that the judge be granted leave with pay;

(4) Upon a finding of physical or mental disability, a recommendation to the Supreme Court that the judge be retired and considered eligible for retirement benefits, pursuant to Arkansas Code Annotated § 24-8-217 (1987);

(5) Reprimand or censure.

H. Dissent. If a member or members of the Commission dissent from a recommendation as to discipline, a minority recommendation shall be transmitted with the majority recommendation to the Supreme Court.

I. No Disciplinary Recommendation. If a majority of the members of the Commission recommend no discipline the case shall be dismissed.

J. Opinion to be Filed. The final decision in any case which has been the subject of a formal disciplinary hearing shall be in writing and shall be filed with the Clerk of the Arkansas Supreme Court, along with any dissenting or concurring opinion by any Commission member. The opinion or opinions in any case must be filed within seven days of rendition.

K. Witness Fees. All witnesses shall receive fees and expenses in the amount allowed by rule or statute for witnesses in civil cases. Expenses of witnesses shall be borne by the party calling them.

Rule 12. Supreme court review.

A. Filing and Service. The Commission shall file its report, record, findings, and recommendations with the Supreme Court and shall serve copies thereof upon the judge no later than thirty (30) days after the report of the factfinder is submitted. On application by the Commission, the court may direct the withholding of a recommendation regarding discipline pending the determination of other specified matters.

B. Prompt Court Consideration. The Clerk of the Supreme Court shall docket any Commission matter for expedited consideration.

C. Brief and Supplementary Filings. The Commission and the judge shall file with the Supreme Court briefs in accordance with court rules within twenty (20) days of the filing and service of the Commission report. No responsive briefs shall be filed unless requested by the court. If the court desires an expansion of the record or additional findings, either with respect to the recommendation for discipline or sanction to be

imposed, it shall remand the case to the Commission for the appropriate directions, retaining jurisdiction, and shall withhold action pending receipt of the additional filing.

The Supreme Court may order additional filings or oral argument as to the entire case or specified issues. The Supreme Court may accept or solicit supplementary filings with respect to medical or other information without remand and prior to an imposition of discipline provided that the parties have notice and an opportunity to be heard thereon.

D. Scope of Discipline. The Supreme Court, when considering removal of a judge, shall determine whether discipline as a lawyer also is warranted. If removal is deemed appropriate, the court shall notify the judge, the Commission and the Supreme Court Committee on Professional Conduct and give each an opportunity to be heard on the issue of the imposition of lawyer discipline.

E. Decision. Based upon a review of the entire record the Supreme Court shall file a written opinion and judgment directing such disciplinary action as it finds just and proper. It may accept, reject, or modify in whole or in part, the findings and recommendation of the Commission. In the event that more than one recommendation for

discipline for the judge is filed, the court may render a single decision or impose a single sanction with respect to all recommendations. The court may direct that no motion for rehearing will be entertained, in which event its decision shall be final upon filing. If the court does not so direct, the respondent may file a motion for rehearing within fifteen (15) days of the filing of the decision.

F. Certiorari. The Supreme Court may bring up for review any action taken upon any complaint filed with the Commission, and may also bring up for review a case in which the Commission has failed to act.

Rule 13. Cases involving allegations of mental and physical disability.

A. Procedure. In considering allegations of mental and physical disability, the Commission shall, insofar as applicable and except as provided in Paragraph B., follow procedure established by these rules.

B. Special Provisions.

(1) If a complaint or statement of allegation involves the mental or physical health of a judge, a denial of the alleged disability or condition shall constitute a waiver of medical privilege and the

judge shall be required to produce his medical records.

(2) In the event of a waiver of medical privilege, the judge shall be deemed to have consented to an examination by a qualified medical practitioner designated by the Commission.

(3) The Commission shall bear the costs of the proceedings, including the cost of a physical or mental examination ordered by it.

Rule 14. Involuntary retirement.

A judge who is advised to retire voluntarily and who refuses may be retired involuntarily by the Supreme Court following the filing of a formal complaint, a public hearing thereon before the Commission, and a report containing a finding that he is physically or mentally disabled, and recommendation to the court that such action be taken.

APPENDIX E

IN THE ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION THREE MEMBER PANEL

No. 07-198, 199, 307, 363

IN RE HONORABLE WILLARD PROCTOR, JR., RESPONDENT,

Hearing Held: April 27, 2009 – May 1, 2009
Opinion Delivered: June 1, 2009

Excerpts from Transcript of the Hearing on April 28, 2009 – April 29, 2009

CHAIRMAN JAMISON: Go ahead, Mr. Porter.

MR. PORTER: Thank you, Your Honor.

MR. PORTER: (Continuing)

Q Ms. Goolsby, let me ask you this. Do you recall being involved in a meeting on the date of September 7, 2007, whereby the Executive Director, David Stewart, was present in this meeting?

A I don't know if I do recall that specific meeting.
Q Okay. Well, let me ask you this. Do you recall a situation where the Executive Director, David Stewart, and Lance Womack met with various prosecutors, including Larry Jegley?
A Yes, I do.

Q Don Johnson? Who is Don Johnson?
A John Johnson is the Chief Deputy.
Q I'm sorry, John Johnson. Who is Wanda Wyeth?
A She is a Senior Deputy at the prosecutor's office.

Q And who is Rob Berry?
A Rob Berry is a Division Chief at the same level as myself and he was my successor in 5th Division.

Q Okay. What about Maureen Satterfield?
A Marianne Satterfield.

Q Marianne, I'm sorry.

A Also a senior deputy. Yes.

Q Okay. And so you recall this meeting that took place on September 7, 2007?
A I don't know when it took place but I do recall meeting. Yes.

Q Okay. And basically, in this particular meeting you met with David Stewart along with

the other prosecutors and Lance Womack to just kind of talk about things or issues --

A Yes.

Q -- or concerns that were going on in 5th Division. Is that correct?
A Yes, we did.

Q As a matter of fact, it was right on the heels of some article that appeared in the Arkansas Times, is that correct?
A Now that I don't know about. I don't know. I don't know what -- I know that there were some articles in the Times but I don't know what dates they were and I don't recall the date of the meeting.
Q All right. Let me ask you this, ma'am. Do you recall when Mr. Stewart asked you about receiving or reviewing a copy of your notes?

A I know that there were some notes that I gave at that time. Yes.

Q Okay. And you gave those notes to Mr. Stewart, is that correct?
A Yes. I gave them to someone. I don't know for sure if it was Mr. Stewart.

Q Okay.

MR. PORTER: Your Honor, we asked in discovery for any and all notes. We need to take this issue up out of the presence of this witness. May the

witness be excused at this point in time, Your Honor, while we argue this particular point?

CHAIRMAN JAMISON: Will you step out?

MS. GOOLSBY: Yes, sir.

(MS. GOOLSBY LEAVES THE HEARING ROOM)

MR. PORTER: Your Honor, in the course of discovery we've asked for any and all notes to be supplied to us from any witness that's going to be testifying, going to be providing information under these proceedings. This meeting occurred back in September of 2007. This witness has testified that she has provided these notes to Mr. Stewart. This is the first time we've ever seen these and it is highly prejudicial at this point in time. We could have had an opportunity to try to refute this information and we have not been given any notes whatsoever by Ms. Goolsby. And Ms. Goolsby testified in her statement, as well as here today, that she did in fact supply some notes to either Mr. Stewart or Mr. Womack during the course of their investigation or their meeting with the prosecutors. And we've never seen it before and we are urging that her testimony be stricken from the record. We never got copies of this stuff. There was a violation

of the discovery rules and it is prejudicial to Judge Proctor in this proceeding.

CHAIRMAN JAMISON: Mr. Sachar?

MR. SACHAR: She said she turned over some notes. She didn't say that it was those notes. Obviously, I can't speak to that, I wasn't even in the office at that time. I don't know that there are any notes. I know Mr. Womack will say that there's zero notes from Tonia Goolsby that were provided to this office. So it's not a situation where they were misplaced or something like that. We do not have anything in our file about which they are asking.

MR. PORTER: Your Honor, I mean, she has testified that she has turned over some notes. Whatever notes she's turned over we never got a copy of. And now she's coming up here with all these notes that she said that she gave -- and Mr. Stewart asked her -- "Mr. Stewart: If you don't mind, could we review a copy of your notes?" And then she said, "Yes." Obviously, that information was turned over to Mr. Stewart. He requested it. We never received it. And so, therefore, for her to come in with all these notes, we could have had an opportunity to dispute this stuff, to go through it line by line, detail by detail as she has done, and it is very prejudicial for Judge Proctor at this point.

CHAIRMAN JAMISON: And what were you reading from?

MR. PORTER: Your Honor, this is the transcript of an interview that Mr. Womack conducted in a meeting. And this meeting -- the Executive Director, David Stewart, was present; investigator Lance Womack was present; the prosecutor, Larry Jegley, was present: John Johnson, Wanda Wyeth and other prosecutors, including Tonia Goolsby. They were being interviewed and asked questions about their dealings with 5th Division and this stuff is contained in the record. And we -- and specifically, Mr. Stewart asked to allow an opportunity to review the notes by Ms. Goolsby and he asked that and she said yes. Obviously -- and she has testified that she did turn over some notes and that was never given to us.

CHAIRMAN JAMISON: Then how did you obtain that transcript?

MR. SACHAR: We turned it over to him.

CHAIRMAN JAMISON: And when did you receive that?

MR. PORTER: Your Honor, the transcript was provided to us -- I'm not exactly sure when the transcript was provided. But we conducted depositions, we sent interrogatories, and their

position has been -- and as a matter of fact, there was a hearing that took place. There was a hearing that took place before this body where they made representations to this body that they had turned over all notes, all records, whatever, to us. And they never have -- they did not do that. We've seen a situation where Treva Cooper has provided some notations to Mr. Womack; we never got it. Now, this is another situation where Ms. Goolsby has testified that she has turned over some notes and records to Mr. Stewart. We asked for that and I believe this body directed Mr. Stewart to provide whatever documents, whatever records to us, and we have not gotten it.

CHAIRMAN JAMISON: I am going to make an exception here and let Mr. Stewart go ahead and respond.

MR. STEWART: Mr. Chairman, I remember the meeting and I remember the discussions. I do not remember specifically asking Ms. Goolsby for notes. Obviously, if the transcript says I did, I did. There's no record in our files that there were any notes accompanying the transcript. There's no recollection on my part that that request was ever followed through on. Our files have been searched thoroughly after Mr. Womack was deposed. We provided that statement. Had there been any accompanying notes, we would have given them to him. We have no reason to keep them. They're

here today. But I will testify under oath, if necessary, that they have been delivered one-hundred percent. Of the evidence of that meeting, no notes are in our file and, to my knowledge and recollection, were ever provided to us by her, even though she may have agreed to do so.

MR. PORTER: And, Your Honor, she testified that she did. She testified that she turned over notes to either Mr. Stewart or Mr. Womack during this particular meeting.

CHAIRMAN JAMISON: Mr. Womack has been sworn. I would like to hear from him on this issue.

(MR. WOMACK TAKES THE WITNESS SEAT)

CHAIRMAN JAMISON: Mr. Womack, I believe you have heard what the issue is all about. I would like your testimony associated with these notes that the previous witness testified to.

MR. WOMACK: I have wracked my brain and I recall absolutely no notes from Ms. Goolsby. We came back from my deposition, we provided that transcript, we went through our files. Unfortunately, we missed the Treva Cooper notes, which is totally included in her sworn statement. We've been as diligent as we know how to be in providing them with everything they've asked for out of a file that's about 12 feet long. I have no

recollection whatsoever of receiving any notes from Tonia Goolsby.

COMMISSIONER LARKOWSKI: Your Honor, can I ask a quick question?

CHAIRMAN JAMISON: Yes.

COMMISSIONER LARKOWSKI: Mr. Sachar said he wasn't even here at the time. Do you know if Mr. Wills was still here at that time or did he have any interaction on this case?

MR. WOMACK: None.

COMMISSIONER LARKOWSKI: Would Ms. Goolsby haven't given them to him?

MR. WOMACK: The only thing I can think of that may have happened is she said "I will get you my notes," and did not.

MR. PORTER: Well, that's not what she said in the transcript. And Mr. Wills was not even present at this particular meeting in the list of persons who were present. And she testified that she gave the notes to Mr. Stewart. Mr. Stewart asked to review the notes and she said she would give them to him. And she testified to that, that that's what she did.

MR. STEWART: Mr. Chairman, I think, inferentially at least, I'm being accused of being a liar.

MR. PORTER: No.

MR. WOMACK: Maybe I am.

MR. STEWART: And I protest that.

CHAIRMAN JAMISON: So noted. But I don't think there was any bad faith with regard to the Cooper matter and I don't think there is here. But I think we need to confer for just a moment and we'll issue a finding.

(BREAK: 4:50-4:52 P.M.)

CHAIRMAN JAMISON: We're not convinced that the Executive Director's office had these documents that's been testified to by the previous witness. We're going to adjourn at this time and will give Judge Proctor overnight to review these documents and you can continue with your questioning tomorrow.

MR. PORTER: We need the rest of it, Your Honor, as well, the documents and reports that she has.

COMMISSIONER LARKOWSKI: She's still here, isn't she?

CHAIRMAN JAMISON: Right, so whatever she has --

MR. STEWART: Mr. Chairman, would you repeat that first statement? I don't think I understood what you just said.

MR. PORTER: He exonerated you.

CHAIRMAN JAMISON: I said that I don't believe you all had these documents.

MR. STEWART: Okay.

MR. SACHAR: I'd like a copy of them, as well, because she had detailed statements. And I assume if he's going to be able to question, then I'm going to want to respond to that too, because she may have more details in there that are helpful to my case, unless they're done with her. If they're done with her, then we're done.

CHAIRMAN JAMISON: Well, who -- this is your witness, so you get the documents and make copies for both sides.

MR. SACHAR: Okay. And they want her back in the morning?

MR. PORTER: Your Honor, first of all, obviously, Ms. Goolsby has expended a great amount of time, research, energy in investigating several files. Now under what circumstances she did that, we don't know. Obviously, she is apparently looking for something to dig on Judge Proctor about. There is no way in the world at this point in time that we're going to be able to go through and look at all these various case files that she has looked at and to try to make some kind of, you know, heads or tails out of this situation. There's just no way. I mean, that's why we wanted this information a long time ago.

MR. SACHAR: Me, too.

MR. PORTER: She had given this statement. They had the meeting with the prosecutor and Mr. Stewart in 2007. And her testimony indicates that she had provided notes to them. Mr. Stewart asked for them and they were provided apparently to them but we've never seen them before. So there's no way in the world we're going to be able to go through this and make any kind of sense out of this and to be able to question her about this. So we're in -- certainly in an unfair disadvantage here.

MR. SACHAR: The court has found that we did not have them and that's why --

MR. PORTER: No, no, no. No, no. The court --

MR. SACHAR: Can I finish?

MR. PORTER: Her testimony has been that she --

MR. SACHAR: Apparently not.

MR. PORTER: -- delivered those documents to Mr. Stewart and to the Executive Director. He asked to see them --

CHAIRMAN JAMISON: And I made a specific finding that we don't believe the Executive --

MR. PORTER: So, you don't believe her testimony? That's what you're saying?

CHAIRMAN JAMISON: Well, I will say that the proof is in conflict with regard to whether or not that information was in the possession of the Executive Director's office, in light of the testimony that I've heard from Lance Womack and the previous witness' testimony.

MR. PORTER: Your Honor, I understand that.

CHAIRMAN JAMISON: And I have ruled that --

MR. PORTER: And I guess you're going to make a credibility finding that her testimony wasn't credible and that the Executive Director and Mr. Womack's testimony is, when his witness has testified that this was a meeting that occurred on September 7th where they met -- the prosecutors met with Mr. Stewart and Mr. Womack. Mr. Stewart specifically asked to review her notes and she said that she gave those notes to him. That's what she testified to. But I guess --

CHAIRMAN JAMISON: And I'm finding that the proof is in conflict. And let's go to --

MR. PORTER: We understand.

CHAIRMAN JAMISON: -- your point raised regarding time.

MR. PORTER: Your Honor --

CHAIRMAN JAMISON: How can we -- in my mind, this witness can be examined later on during these proceedings.

MR. SACHAR: Your Honor, my point to that, before I was interrupted, was that's not our problem. This document was not in our possession to turn over and they have it now. They had every opportunity to depose every single one of these witnesses. That's what the Rules of Civil Procedure are for, diligent discovery. You cannot refuse to do your discovery and then hide behind the law and later on say, "Oh, we were unprepared." They could have -- if they would have deposed her and found that out, we'd both have a set of those documents.

MR. PORTER: Well, but apparently she said she gave them to you and you guys have never given them to us. That's what she testified to. So obviously, you guys were just hiding documents and keeping documents from us.

CHAIRMAN JAMISON: And from now on, when one lawyer is speaking the other one will remain quiet. Were you finished, Mr. Sachar?

MR. SACHAR: Apparently I was. Thank you, Your Honor.

CHAIRMAN JAMISON: Do you have anything else to say, Mr. Porter?

MR. PORTER: I'm finished with that matter, Your Honor. I just think this is a very unfair situation. There's no way we're going to be able to go through this stuff and try to examine this witness. I mean,

we're probably going to need -- we just can't do it.

CHAIRMAN JAMISON: We will proceed in the morning with this particular witness.

(THE HEARING WAS ADJOURNED AT 5:00 P.M.)

MR. PORTER: (Continuing on April 29, 2009)

Q Ms. Goolsby, isn't it true, ma'am, that we met with Mr. Stewart and also Lance Womack of the Judicial Discipline and Disability Commission on September 7th, 2007?
A I did meet with them. I don't know what the date was, though.
Q Okay. And there were other people, other prosecutors in the office --
A Yes, sir.
Q -- that we talked about yesterday; is that correct?
A Yes, sir.
Q Isn't it true that you provided Mr. Stewart with some notes during that particular meeting?
A You know, I brought some notes to that

meeting and there were several people in there. I don't recall if I provided him the notes or not and I don't know if I had these particular notes that I have with me today. At that time that was an impromptu meeting for me and during the meeting, I went to get some notes that I had kept while I was in 5th Division about what I thought were some of the irregularities. I don't know that I had these notes on specific cases or anything like that.

Q Okay. Now I noticed yesterday evening that at the conclusion of this hearing you met with Mr. Stewart and Mr. Sachar; is that correct?

A I did.

Q And approximately how long did you meet?

A Five minutes.

Q Five minutes. All right. Let me, ma'am, direct your attention -- now, during the particular discussion and during the particular meeting that you had with Mr. Stewart -- and let me provide you, ma'am, with a copy -- Ms. Goolsby, I'm putting in front of you what appears to be a recording of the meeting that took place on September 7, 2007, whereby Mr. Stewart and Mr. Womack, Larry Jegley, John Johnson, Wanda Wyeth, Rob Berry, Marianne Satterfield and Tonia Goolsby were present during a particular meeting that occurred on September 7, 2007. Do you recall that meeting?

A I recall that there was a meeting, yes, sir.

Q Do you recall any other meeting that you may have had with Mr. Stewart and Mr. Womack?

A I did have another meeting with Mr. Womack. I never had another meeting with Mr. Stewart.
Q Okay. All right. Now, according to this particular meeting --

MR. PORTER: Your Honor, for the sake of the panel I would like to provide a copy of the transcript whereby the panel can read along as well -- excerpts, anyway.

MR. PORTER: (Continuing)
Q Ms. Goolsby, let me direct your attention, ma'am, to page 43 of that particular record. Do you have page 43 in front of you?
A Yes, sir, I do.
Q Okay. Now according to this particular document, now who is Mr. -- Mr. Womack apparently asked questions?
A He did ask some questions.
Q "That's what I'm" -- he said, "That's what I'm interested in is some of these ex parte letters that y'all were talking about and you mentioned the Jermaine Narissi (ph). That was one of them. There was another, Willie Coleman, that he said he recused from. Can you think of any more of those?" And what is your response?
A I said, "I have some in my office. Do you want me to go get it?"
Q And then what did -- and then apparently

Larry Jegley tells you, "Yes, go ahead and get them." Is that correct?
A Yes.
Q All right. Then, of course, then, you come back and then you said -- what do you say?
A I said, "I have a couple of days that he made specific comments like that day where he said something and I'll take care of it."
Q Okay. What are you referring to?
A I was specifically referring at that time, I believe, to the -- I think his name was -- the Michael Pippins case that I talked about yesterday, where the judge specifically said to him in open court, "You need to stop talking, write to me directly" --
Q Okay.
A -- "and I'll see what your problem is and I'll take care of it and I'll decide if I need to tell the lawyers about it."
Q Okay. Now, Michael Pippins is specifically mentioned in that particular report that you prepared; is that correct?
A In which report? Are you talking about in my statement?
Q Yes.
A Yes.
Q Okay.
A Yes.
Q Now -- and then you see Mr. Jegley, he said, "Yeah, go get your copies?"

A Right.
Q Do you see that?
A Uh-huh.
Q And then Mr. Womack says, "Yes." Now at some point, obviously, you went and got copies of your records; is that correct?
A I went to my office and got a couple of things. Yes, I did.
Q What did you get?
A Well, I got the specific notes that I had from the day of Michael Pippins and I also had made a note as to Willie Coleman.
Q Okay.
A And he did not recuse from Willie Coleman. He mentioned that he felt he was affected by the letters and he was concerned about presiding over his case. The next time we came to court he said he had changed his mind about that.
Q Right.
A But I had notes specifically on those incidents because they had concerned me.
Q All right. Let me direct your attention, ma'am, to page 59 of the document. Do you see that?
A I do see page 59.
Q Okay. At the bottom where you say -- Ms. Goolsby, will you read what's recorded there?
A At the very bottom?
Q Yes.
A I said, "Right. Right. There was an issue

with the case number but he mailed it like -- like the woman when she took her copy to the ADC, they copied the whole thing, and they got a copy of the letter that went out from the Judge's clerk directly to Brandon Roe in the ADC, "Here's your order," copied to mama, not cc'd to us, not cc'd to John Wesley Hall. Because normally we call the AG and they call the ADC and say, "Hey, this thing is coming."

Q Now, Mr. Stewart is telling you do you -- asking you do you have copies of that; is that correct?

A Yes.

Q And that's David Stewart asking about copies of that; is that correct?

A Yes.

Q And Mr. Johnson -- now, who is Mr. Johnson?

A That's John Johnson, who's the Chief Deputy at our office.

Q John Johnson said, "Yes." And then, of course, you're reported as saying yes as well; is that correct?

A Yes.

Q And then Mr. Jegley -- of course, Larry Jegley, who is the prosecutor -- he says, "And you can see I was looking over John's shoulder and you can see where he was talking about these reports -- report. You can take Hugh Finkelstein's notes and make rubberstamps out of it and just stamp

everything on the back of your file jacket where we keep the notes about that." And let me direct your attention, ma'am, also to page 65 of this report.

A Yes, sir.

Q At the very top, Mr. Jegley said, "I think they would be very interested in you reading your recollection of off-the-record stuff." And then Mr. Stewart says, "Yeah." And then Mr. Jegley said, "I don't have a problem with you supplying it to these guys."

A Uh-huh.

Q Now, what is Mr. Jegley telling you to supply to Mr. Stewart and Mr. Womack?

A Do you mind if I read the page prior to that --

Q Yes, ma'am, go ahead.

A -- to get the context? We were talking about -- I had stated earlier that I didn't think that I had anything that Mr. Womack wanted a copy of. Most of the stuff that I had was my notes or emails. And then Mr. Jegley says that he doesn't have a problem with supplying it, and then Mr. Stewart says, "Can we view a copy of your notes?"

Q Okay. And then -- and Mr. Stewart asked you, "If you don't mind" -- and I'm looking at page 65. Mr. Stewart said, "If you don't mind, can we view a copy of your notes?"

A Yes.

Q And what's your response?

A "Yes."

Q And then Ms. Satterfield says, "Are those all

our emails we were doing?" And then what's your response?

A "Yes."

Q Go ahead and read.

A I said, "Yes. The defendants write letters to the Judge and apparently he puts them in a big box in his office or takes them home, according to a staff member. But I never saw those boxes."

Q Now, let me also direct your attention, ma'am, to page 67.

A Yes, sir.

Q And on page 67, Mr. Jegley is asking, "Do you need to make a copy of that?" Do you see that?

A Yes, I do.

Q And your response?

A My response was, "I don't know what they do now. That was back in '06." And that was a copy I believe of the Rules of Civil Probation.

Q All right. And then Mr. Stewart said -- what he asks -- Mr. Stewart said, "Well, I need a copy, if you can." And then your response is?

A "Okay."

Q All right. And so there are various references during this particular meeting about supplying copies of various documents or various notes that you had taken. And Mr. Stewart asks on several occasions if he can get copies of your notes, and then your response is that you would get -- that you would be getting those notes to him; is that correct?

A Yes, sir.
Q All right. So during this particular meeting on September 7, 2007, Mr. Stewart did in fact ask you for copies of your notes and you did in fact give him copies of your notes; is that correct?
A I gave him copies of some specific things.
Q Ma'am, my question is very serious. Did you have some notes that you had prepared regarding specific cases in Judge Proctor's office?
A Mr. Porter, my answer is very serious. Yes, I did.
Q Ma'am, I -- okay. And did you supply those records and those notes to Mr. Stewart?
A I supplied some records and notes to Mr. Stewart. I have not kept --
Q All right. That's fine.
A Can I finish my answer?
Q Ma'am, that's all I have on that --
A Okay.
Q -- particular point.
A All right.
MR. PORTER: Your Honor, I'm done with this particular witness. Again, we are renewing our motion. It's very obvious that Mr. Stewart was provided with notes during this particular meeting, and Ms. Goolsby provided those notes to Mr. Stewart and Mr. Womack. We never got copies of them. This is a very serious matter. We asked for it in discovery; we've never been provided a copy of it. If Mr. Stewart wants to get on the stand, I

would certainly like to ask him on the stand about these notes. And also I want to put Mr. Womack back on the stand and ask him about this particular meeting and what notes were they provided.

CHAIRMAN JAMISON: We ruled on that yesterday, and I'm standing by that ruling.

MR. PORTER: You're standing by the ruling?

CHAIRMAN JAMISON: Yes.